

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

2010 JUN -2 AM 6:57✓

JEANNE HICKS, CLERK

Katherine Glenn

STATE OF ARIZONA,) Yavapai Superior
) Court No.
) P1300CR20081339
 Plaintiff,)
) Excerpt of Jury
 vs.) Trial; Oral
) Argument re
 STEVEN CARROLL DEMOCKER,) Motions
)
 Defendant.)
 _____)

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Proceedings held before the Honorable Thomas B. Lindberg

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Prescott, Arizona

May 28, 2010
9:29 to 11:33 a.m.

Sandra K Markham, CR, RPR, CSR
Certified Reporter
Arizona License No. 50001

ORIGINAL

1 **APPEARANCE OF COUNSEL:**

2 For Plaintiff:
3 JOSEPH BUTNER
4 JEFFREY PAPORE,
 Deputy County Attorneys,
 Yavapai County Attorney's Office.

5 For Defendant:
6 JOHN M. SEARS,
 Attorney at Law.

7 LARRY HAMMOND,
 Attorney at Law.

8 ANNE CHAPMAN,
9 Attorney at Law.

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09:29:35 1 THE COURT: Record reflects the presence of the
09:29:40 2 defendant, Ms. Chapman, Mr. Sears, Mr. Hammond and the
09:29:44 3 prosecution represented by Mr. Butner and Mr. Papore.

09:29:47 4 With regard to the defense motion in limine
09:29:52 5 to prevent the State from calling Peter Barnett, the Court
09:29:56 6 went back and took a look at the cited cases. I am going
09:30:00 7 to deny that motion in limine at this time.

09:30:08 8 MR. SEARS: Your Honor, may I ask a point of
09:30:10 9 clarification on that?

09:30:11 10 THE COURT: Yes.

09:30:12 11 MR. SEARS: Is your ruling in any way connected
09:30:14 12 to the idea that the defense would not call Mr. Barnett?

09:30:17 13 THE COURT: No.

09:30:18 14 MR. SEARS: So it's whether we call Mr. Barnett
09:30:21 15 or not?

09:30:22 16 THE COURT: If you call Mr. Barnett, then I think
09:30:24 17 the State will be able to cross. If you don't call
09:30:30 18 Mr. Barnett, then the State will be allowed and you can
09:30:32 19 cross.

09:30:33 20 MR. SEARS: So to be clear, my reading of the
09:30:35 21 State's motion was that they thought they had a right to
09:30:37 22 call Mr. Barnett in their case in chief before we had an
09:30:40 23 opportunity to put on our evidence. Are you saying that's
09:30:42 24 not true?

09:30:43 25 THE COURT: No. I am saying I believe they can

09:30:45 1 do that, also.

09:30:48 2 MR. SEARS: Thank you.

09:30:49 3 THE COURT: I am denying the motion in limine.

09:30:53 4 Are you intending to call him as a witness
09:31:04 5 now?

09:31:04 6 MR. SEARS: We have been put in this impossible
09:31:07 7 position. If that's your ruling, the --

09:31:11 8 THE COURT: My understanding was you weren't
09:31:12 9 going to call him.

09:31:13 10 MR. SEARS: No. We had not made a decision. Our
09:31:16 11 motion says we might not call him, but now this adds
09:31:20 12 another layer to that decision, which is if we announce we
09:31:24 13 are not going to call him, then surely the State will try
09:31:26 14 to call him in their case and the disruption and twisting
09:31:32 15 of the circumstances of his retention and his working this
09:31:36 16 case.

09:31:36 17 THE COURT: I meant to discuss that and I
09:31:40 18 appreciate your bringing it up. If the State calls him as
09:31:43 19 their witness, I am going to preclude them on a 403 basis
09:31:47 20 from bringing out the fact he was hired by the defense.

09:31:52 21 MR. BUTNER: I understand that, Judge.

09:31:54 22 MR. SEARS: Well, let's go back to the basic
09:31:56 23 premise. Let's assume for a moment that we will call him,
09:32:00 24 and that may well be our decision now, at least in part,
09:32:03 25 to avoid this spectacle.

09:32:06 1 I am not clear about the basis on which
09:32:12 2 that, if he was simply our witness and we were going to
09:32:14 3 call him, what has changed in the interim from any other
09:32:18 4 witness. And such a ruling would allow the State to call
09:32:22 5 any of our disclosed witnesses, expert witnesses in their
09:32:25 6 case in chief. And I continue to believe that just seems
09:32:30 7 on many levels to be improper in this.

09:32:32 8 So let's just assume, your Honor and
09:32:34 9 Mr. Butner, that the defense intends to call Mr. Barnett.
09:32:38 10 My thought would be your ruling might apply if the defense
09:32:42 11 rests and doesn't call Mr. Barnett and the State wants to
09:32:45 12 then consider calling him in rebuttal at that point, but I
09:32:50 13 still think there is a very serious problem that is
09:32:52 14 created by the idea that merely disclosing a witness under
09:32:57 15 Rule 15 and submitting them to an interview then allows
09:33:01 16 the State -- I don't want to over blow this, but
09:33:02 17 essentially highjack our witness -- to call any witness
09:33:05 18 because they go first.

09:33:07 19 And we had the discussion yesterday about
09:33:09 20 the burden of proof and presumption of innocence, right to
09:33:11 21 present a defense or the corresponding right not to
09:33:14 22 present a defense and to -- I think the chilling effect
09:33:18 23 that I spoke about yesterday is apparent if that is the
09:33:22 24 circumstances. Is that why would a defendant under the
09:33:25 25 circumstances ever submit one of their witnesses to an

09:33:30 1 interview, if this was the consequence.

09:33:34 2 So I would ask the Court to say -- to say
09:33:39 3 within reason that if the State wants to call Mr. Barnett
09:33:42 4 in rebuttal, I am not even comfortable with that idea, but
09:33:47 5 that is a very different proposition than this one, which
09:33:49 6 is that even though the State -- the defense now says we
09:33:53 7 will call Mr. Barnett, that that -- that the circumstances
09:33:56 8 of this case give the State the right to call Mr. Barnett
09:33:59 9 first.

09:34:01 10 THE COURT: Mr. Butner, do you have a position on
09:34:03 11 that?

09:34:03 12 MR. BUTNER: Judge, I think just to reiterate our
09:34:07 13 argument from yesterday. I believe that a trial is a
09:34:12 14 quest for the truth and in this particular instance, I
09:34:19 15 believe that Mr. Barnett will assist the finder of fact in
09:34:23 16 finding the truth in this case and the defense has allowed
09:34:29 17 this witness to be interviewed. Has indicated clearly
09:34:32 18 this witness is going to testify concerning certain areas.
09:34:35 19 We specified those yesterday and I don't even have that
09:34:38 20 stuff with me now, and -- but, of course, he is a blood
09:34:44 21 spatter expert, crime scene expert and things of that
09:34:47 22 nature.

09:34:48 23 THE COURT: If you call him, are you paying for
09:34:49 24 him, too?

09:34:49 25 MR. BUTNER: Exactly. We have to pay for him,

09:34:51 1 yeah. He is an expert witness and I am sure he's going to
09:34:56 2 require a significant fee to come down here from Northern
09:35:01 3 California and testify. So we will be prepared to pay
09:35:06 4 that, and I think that it's appropriate that we be allowed
09:35:09 5 to call him as a witness.

09:35:11 6 They waived any privilege associated with
09:35:14 7 the area that we were allowed to interview him in. They
09:35:17 8 asserted privilege in regard to the areas that we were not
09:35:21 9 allowed to interview him in, and we honored their
09:35:24 10 assertion of that privilege.

09:35:28 11 Thank you.

09:35:28 12 THE COURT: Mr. Sears, anything?

09:35:32 13 MR. SEARS: This is such a novel idea that I am
09:35:35 14 really -- I am really a bit flat footed to think out a
09:35:41 15 response.

09:35:41 16 This is the ordinary course of events in
09:35:45 17 every criminal case driven primarily by Rule 15 and the
09:35:50 18 requirement that the defense fulfill its disclosure
09:35:53 19 obligations in advance of trial, but the defendant still
09:35:57 20 has an overriding and I think a superior constitutional
09:36:01 21 right to remain silent or a sixth amendment right to
09:36:07 22 present a defense and to make that decision only when it
09:36:10 23 is time to make that decision.

09:36:12 24 And this ruling, if I understand it, would
09:36:15 25 essentially stand on its head. Would say that a

09:36:18 1 defendant, once he discharges his Rule 15 obligation, then
09:36:21 2 has given up the right to make the decision about which
09:36:25 3 witnesses and what evidence he will call. And it allows
09:36:28 4 the State, who goes first who, has the burden of proof, to
09:36:31 5 pull in the defense witnesses who the defense may never
09:36:38 6 choose to call and present them to the jury out of
09:36:40 7 order -- out of order in this case and create this bizarre
09:36:44 8 artifice that Peter Barnett is somehow the prosecution's
09:36:48 9 witness in this case.

09:36:50 10 So where does that leave the defendant? If
09:36:54 11 Mr. Barnett says something and the jury thinks he is a
09:36:57 12 prosecution witness, how does the defendant say, wait a
09:37:00 13 minute, you were our witness, you know, and how did this
09:37:03 14 happen? And how is it that you are now being called
09:37:06 15 essentially as a witness against your own client, the
09:37:11 16 person with whom you were working.

09:37:13 17 It creates such a -- such a bizarre
09:37:18 18 structure in my mind, I can't even really think about how
09:37:21 19 this is going to happen. And it's one thing to say that
09:37:24 20 if they think he's valuable and we don't hear from him in
09:37:28 21 the defense, that they could call him as a rebuttal
09:37:30 22 witness. I am not terribly comfortable with that, but I
09:37:35 23 am far more comfortable with that than I am with this idea
09:37:36 24 that the State would call him and then call him under this
09:37:40 25 artificial and false circumstance that he is somehow their

09:37:46 1 witness, and it just -- it creates -- I can't even think
09:37:52 2 of the cascade of problems from a practical point of view
09:37:55 3 and from an examination point of view that creates.

09:37:58 4 THE COURT: I think the law, at least in Arizona,
09:38:00 5 a long time gave up -- a long time ago gave up the idea
09:38:03 6 that witnesses are owned by one side or the other, so
09:38:06 7 that's my ruling.

09:38:10 8 MR. SEARS: Are you saying that is true with
09:38:12 9 respect to retained experts?

09:38:15 10 THE COURT: I am saying that is my ruling with
09:38:17 11 regard to Mr. Barnett.

09:38:19 12 What did you want to address in terms of any
09:38:21 13 priority? The jury issue, obviously we need to get to
09:38:29 14 that today.

09:38:30 15 MR. SEARS: That's what we want to talk about,
09:38:32 16 your Honor.

09:38:33 17 THE COURT: I had a -- obviously we have
09:38:40 18 interviewed, given questionnaires to a large number of
09:38:48 19 jury panel members. Have conducted interviews of them
09:38:54 20 since May 4th. They are what is termed death qualified,
09:39:07 21 and then the day before yesterday the State struck the
09:39:13 22 death penalty allegation and the Court granted the motion
09:39:20 23 to strike.

09:39:20 24 So now I have filed a motion to dismiss the
09:39:28 25 death qualified panel filed by the defense, and I received

09:39:38 1 a response to that filed by the State.

09:39:43 2 Mr. Sears.

09:39:45 3 MR. SEARS: Thank you, your Honor.

09:39:46 4 THE COURT: Or whoever chooses to address this.

09:39:49 5 MR. SEARS: That will be me, your Honor.

09:39:50 6 I think we need to pull back again for just
09:39:55 7 a second and look at what has happened in the last now
09:40:01 8 less than 48 hours since this Court signed an order
09:40:04 9 dismissing the death penalty in this case.

09:40:07 10 I think it is -- must be obvious to the
09:40:10 11 Court that this was a position taken by the defense from
09:40:14 12 the very moment that death was noticed in this case, which
09:40:19 13 interestingly enough was done in the Justice Court when
09:40:21 14 Mr. Democker was arrested. There was a death notice filed
09:40:25 15 with the felony Complaint in the Justice Court and from
09:40:28 16 that moment forward, we had opposed the notion this was
09:40:31 17 ever a death penalty case in every place we could do that.

09:40:37 18 We have litigated it in many different ways
09:40:41 19 to this Court and we have maintained some degree of
09:40:45 20 communication with the County Attorney's office and in an
09:40:51 21 effort to keep a discussion going about whether or not,
09:40:55 22 after the State came to see what their evidence was and
09:40:58 23 what their evidence was not in this case, whether they
09:41:00 24 thought this was a case that ought to be maintained as a
09:41:03 25 capital case.

09:41:04 1 So I think we can fairly conclude at this
09:41:08 2 moment that the circumstance that we are in now is in no
09:41:12 3 way connected to anything that the defense did, and I
09:41:16 4 think we can similarly conclude that the circumstance we
09:41:19 5 find ourselves in today is in no way a result of anything
09:41:24 6 this Court has done.

09:41:25 7 I can think back to January of this year and
09:41:29 8 the comments that the Court made directed to the County
09:41:34 9 Attorney's office inquiring reasonably whether they were
09:41:36 10 continuing to examine internally the propriety of this
09:41:41 11 being a capital case. We know where that took us and we
09:41:44 12 know what the County Attorney's ultimate response to what
09:41:49 13 we thought was at the time a perfectly reasonable and
09:41:52 14 appropriate inquiry by the Court.

09:41:54 15 But we think for those reasons and also for
09:41:56 16 the reasons that this Court has grappled with and ruled on
09:42:01 17 many, many motions in this case filed by us, looking at
09:42:07 18 the death penalty as unconstitutional across the board,
09:42:11 19 unconstitutional as applied to Mr. Democker,
09:42:13 20 unconstitutional in the facts of this case, and the many
09:42:17 21 motions we filed, some of which were granted, dealing with
09:42:20 22 the death penalty and removing it as a sanction for
09:42:25 23 significant discovery violations in this case. So I don't
09:42:29 24 think the Court has any part in how we got to this moment.

09:42:35 25 Now, we have said publicly and to this Court

09:42:41 1 that we respect the role of the County Attorney, both in
09:42:44 2 deciding to seek death and their role in deciding to
09:42:48 3 unilaterally take death off the table, and we have tried
09:42:53 4 to maintain a position of, at least, neutrality with
09:42:58 5 respect to that. But there are a couple of observations
09:43:01 6 that I think we can all make that can't be in serious
09:43:03 7 dispute.

09:43:03 8 The public statements of the County Attorney
09:43:07 9 as reported in the press, which is the only place we have
09:43:09 10 seen them, because the motion filed with the Court had one
09:43:13 11 sentence basically. The public statements of the County
09:43:16 12 Attorney in regard to this talk about, in general terms,
09:43:21 13 about the investigation being an ongoing process, which is
09:43:24 14 what counsel in this room told you in January was the
09:43:30 15 case, without any detail about what that process was or
09:43:32 16 what it was, if anything, that changed to cause them to
09:43:37 17 revisit this and they also talked about respecting the
09:43:40 18 views of victim in this case.

09:43:41 19 Well, we know without question that the
09:43:44 20 views of Katie and Charlotte Democker, victims in this
09:43:47 21 case, have been clear and unequivocal and made known from
09:43:51 22 the first moment of this case and have never changed.

09:43:55 23 We don't know how and under what
09:43:59 24 circumstances the views of the Kennedy family of Ruth and
09:44:02 25 John Kennedy were communicated to the County Attorney or

09:44:06 1 when. Not really our business and we are not proposing
09:44:09 2 that some inquiry be conducted here to find out what it is
09:44:13 3 that drove the County Attorney to make this decision.

09:44:14 4 But as between the Court, defense and the
09:44:18 5 prosecution, in terms of trying to figure out how we got
09:44:21 6 to this moment, I think the only party in that three
09:44:29 7 legged stool that has taken us to this point is the County
09:44:32 8 Attorney's office. I am not pointing fingers and casting
09:44:34 9 blame. I am simply making an observation that I think is
09:44:37 10 inescapable in this case.

09:44:39 11 I think the record and I think what we all
09:44:41 12 know both from things in court and from things outside of
09:44:44 13 court is that to the extent their statements in the press
09:44:49 14 represent an accurate and complete explanation of the
09:44:52 15 decision that was made two days ago in this case, a person
09:44:58 16 could look at that and say reasonably that that
09:45:02 17 information, or most of it, or all of it, could have been
09:45:05 18 and was likely known to the County Attorney well before
09:45:09 19 this week, and we do not know and will probably never know
09:45:14 20 what it is that took the County Attorney so long to come
09:45:16 21 to this decision.

09:45:17 22 But the County Attorney also knew that we
09:45:22 23 had very nearly completed the jury selection process with
09:45:26 24 this as a capital case with a death qualified Witherspoon
09:45:30 25 and Morgan jury, and so what we have here, your Honor, is

09:45:35 1 a situation that we think is unique in all the country.
09:45:41 2 We have spent the last two days to the extent we were not
09:45:44 3 in court litigating other matters, using our own resources
09:45:49 4 and reaching out to this very large network that we have
09:45:53 5 been connected to for some time of death penalty
09:45:56 6 practitioners all over the country, state and federal.

09:45:59 7 There are -- there is a remarkable degree of
09:46:03 8 communication and cooperation between those of us that do
09:46:05 9 death penalty work on a regular basis and there are
09:46:08 10 resources available to us that connect us to people who
09:46:13 11 are as serious about this work as we believe we are, who
09:46:18 12 drop what they are doing to come to our assistance and to
09:46:21 13 try and find us answers.

09:46:23 14 We looked for reported cases and we looked
09:46:25 15 for unreported cases that would approximate this
09:46:29 16 circumstance, which is a death qualified jury is selected,
09:46:34 17 a strike pool is created, but before the jury is sworn and
09:46:38 18 seated, death is taken off the table, and we are here to
09:46:42 19 tell you, your Honor, based on what we have been able to
09:46:44 20 do in the last 48 hours, with that limitation, we don't
09:46:48 21 see any similar circumstance in the United States of
09:46:51 22 America. We are absolutely certain it has not happened in
09:46:54 23 the State of Arizona.

09:46:57 24 Our network of resources, including backup
09:47:01 25 centers, support groups, foundations, but most importantly

09:47:04 1 lawyers who are in the trenches defending these cases
09:47:07 2 primarily in Maricopa and Pima County, tell us that they
09:47:10 3 have never had this experience. They have never heard of
09:47:13 4 this experience. Can't think of a circumstance in their
09:47:16 5 recollection where this has happened, and the same is said
09:47:20 6 nationally.

09:47:21 7 We can't be quite as confident that we have
09:47:24 8 reached out to every corner of the United States, but we
09:47:28 9 have reached out in the only way we know how, to people
09:47:30 10 who are death penalty professionals, and they have in turn
09:47:35 11 canvassed the organizations and groups that they have
09:47:38 12 connections to, and we have gotten information from them,
09:47:42 13 but not a single reported or unreported decision that is
09:47:48 14 similar to these facts, and so that is the predicate.

09:47:53 15 We have also tried to put together our legal
09:47:56 16 brief in a remarkably short period of time for such a
09:47:59 17 serious matter. We filed our brief yesterday and here we
09:48:03 18 are today just about now 48 hours downstream arguing this
09:48:08 19 critically important matter to the Court.

09:48:10 20 We got the State's response 15, 20 minutes
09:48:14 21 ago in this case, your Honor, so that is another great
09:48:16 22 limitation.

09:48:17 23 So let me -- let me begin with what I think
09:48:21 24 is the obvious drive -- an obvious driving factor in any
09:48:27 25 decision here, which is the economics of this and

09:48:31 1 inconvenience of doing something different. We have --
09:48:36 2 what makes this case unique is that we have a jury that
09:48:40 3 has been presumptively qualified from whom strikes could
09:48:43 4 be made and if this were maintained as a death case.

09:48:48 5 There is a question about how many people
09:48:51 6 will be assembled next week. It's probably going to be
09:48:55 7 the 40 and there may be some dropouts. It's likely one
09:48:58 8 that you showed us may be excused for hardship, leaving us
09:49:04 9 a smaller pool.

09:49:05 10 And there was a considerable expense
09:49:09 11 incurred not only by the Court and the county for
09:49:12 12 assembling these jurors, paying them, bringing them in,
09:49:15 13 but obviously an expense to the entire system of having
09:49:19 14 all the days of jury selection that we had aimed at that
09:49:23 15 point.

09:49:23 16 But here is the balance that I think needs
09:49:26 17 to be struck. Is it appropriate, and as we will talk
09:49:30 18 about here shortly, is it appropriate to make a decision
09:49:35 19 that affects the constitutional rights of this man and his
09:49:38 20 right to liberty, potentially the loss of liberty for the
09:49:41 21 rest of his natural life on a teeter totter that is
09:49:47 22 balanced against inconvenience and cost and economics.

09:49:52 23 And I would think that the Court would feel
09:49:56 24 that in many other instances, no matter how inconvenient
09:50:00 25 or expensive something may be, if it is constitutionally

09:50:04 1 required and if the law and facts of this man's case
09:50:07 2 require it, that cost and inconvenience have to give way
09:50:12 3 to a person's constitutional rights.

09:50:14 4 There is no greater constitutional right, I
09:50:17 5 would submit, than the right to liberty, and the right to
09:50:23 6 pursue your life under the Declaration of Independence and
09:50:27 7 the Constitution, and any process that proposes to take
09:50:32 8 that from another citizen has to be carefully managed.

09:50:37 9 It is perhaps irresistible in some respect
09:50:42 10 to think about grabbing onto this jury who could be
09:50:46 11 assembled pretty quickly, sworn, and seated to hear the
09:50:50 12 trial of this case, so let's think about what the legal
09:50:53 13 underpinnings of that are.

09:50:55 14 The State has, I think, understandably
09:50:59 15 seized on Lockhart versus McCree and the Court asked me
09:51:03 16 last week whether I was disagreeing with the proposition
09:51:06 17 that this death qualified jury could be fair and
09:51:12 18 impartial, so let's think about Lockhart and think about
09:51:15 19 how this case is different. Lockhart was charged with
09:51:19 20 capital murder and went to trial with a Witherspoon death
09:51:23 21 qualified jury. Lockhart was convicted and went into a
09:51:27 22 penalty phase. Remember that Lockhart was many, many
09:51:32 23 years before Ring.

09:51:33 24 But Lockhart's complaint was, after he was
09:51:38 25 found -- acquitted of the death penalty and given life,

09:51:41 1 that he should not have been tried in the first instance
09:51:43 2 by a death qualified jury.

09:51:46 3 And the Lockhart court took the opportunity
09:51:49 4 to write an opinion which is frequently cited by people
09:51:52 5 who believe that death qualified juries are not conviction
09:51:56 6 prone juries to a damaging or unconstitutional sense for
09:52:00 7 the general proposition that death qualified jurors are
09:52:03 8 just as fair as a non-death qualified jury. That is an
09:52:06 9 overstatement of the holding in Lockhart, your Honor.

09:52:08 10 Frankly, one way to look at Lockhart is that
09:52:11 11 it never needed to be decided, because Witherspoon set the
09:52:15 12 stage many years before Lockhart, nearly 20 years before
09:52:19 13 Lockhart, for the idea that a person could face capital
09:52:23 14 punishment in a trial and receive a fair trial from a
09:52:25 15 death qualified jury. That was a monumental shift in
09:52:29 16 prior practice in 1968 by the Warren court, which said
09:52:34 17 that henceforth death qualification, excluding people who
09:52:39 18 were morally or personally opposed to the imposition of
09:52:43 19 the death penalty did not deprive a person of their sixth
09:52:45 20 amendment right to a fair trial.

09:52:46 21 But it is an overstatement to say that
09:52:48 22 Lockhart says that any defendant under any circumstance
09:52:51 23 can always get a fair trial from a death qualified jury.

09:52:54 24 Without -- without going over again the
09:52:57 25 arguments that we made to you in our motion from the

09:52:59 1 capital jury project which post-dated by many years
09:53:02 2 Lockhart and the social science and the body of knowledge
09:53:06 3 that's connected with that, that contradicts what was not
09:53:09 4 available to Justice Rehnquist in the Lockhart court about
09:53:15 5 the true nature of death qualified juries insofar as they
09:53:21 6 are conviction prone. I think that just goes without
09:53:24 7 saying. We presented that evidence to you in other
09:53:27 8 motions, your Honor.

09:53:28 9 But what I want to focus on is this case and
09:53:31 10 not in general terms, and let's begin with this: And it
09:53:36 11 has to do with Mr. Democker's sixth amendment right to
09:53:39 12 effective assistance of counsel. Mr. Hammond and
09:53:43 13 Ms. Chapman and I have done capital litigation in a number
09:53:48 14 of different forums, in federal court and in state court
09:53:51 15 in different states. And we have remained active and
09:53:55 16 connected to the capital defense bar nationally, and there
09:54:00 17 has been a change over time. Certainly in my career going
09:54:04 18 back 20 years or so in state court capital litigation and
09:54:10 19 the way capital jury selection is handled.

09:54:13 20 What has happened as we pointed out in our
09:54:15 21 motion, your Honor, is that within the last four or five
09:54:19 22 years, there has become a consensus among those of us that
09:54:23 23 do capital defense that when you are selecting a jury in a
09:54:27 24 death penalty case, the focus -- and there is debate about
09:54:31 25 whether it is the entire focus or principle focus -- but

09:54:34 1 the focus in selecting jurors must be their attitudes and
09:54:37 2 beliefs about the death penalty.

09:54:39 3 There are serious practitioners who have
09:54:42 4 developed wonderfully successful models for selection of
09:54:46 5 capital juries that would return a like verdict that say
09:54:50 6 unequivocally that you must not consider any other
09:54:55 7 circumstance in voir dire of a capital jury other than the
09:54:58 8 death penalty, so that represents one extreme.

09:55:01 9 There are people like the lawyers in this
09:55:04 10 room who have a slightly different view, which says that
09:55:07 11 must be the principle focus, but there are other attitudes
09:55:11 12 and beliefs and behaviors that are relevant, but
09:55:14 13 ultimately they all tie in to the underlying belief that
09:55:20 14 the death penalty drives the jury selection process from
09:55:22 15 the defense side.

09:55:23 16 We retained Joe Guastaferro in this case.
09:55:27 17 Mr. Hammond and I have worked with him in a major lengthy
09:55:31 18 federal prosecution that began in New Mexico and has
09:55:35 19 concluded in the District of Arizona that lasted about
09:55:37 20 three-and-a-half years and we came to know him and we
09:55:41 21 believe him to be at the top of the list of people who do
09:55:47 22 jury consulting in death penalty cases. We don't know of
09:55:50 23 anyone who is more experienced or has the broad range of
09:55:54 24 experience that Joe brings to this case.

09:55:57 25 When we retained Joe, we began to work

09:56:00 1 immediately on a strategy in this case for the selection
09:56:03 2 of a life giving jury, and that was our goal and that --
09:56:08 3 we did modeling. We developed the questionnaire that was
09:56:12 4 in large part adopted by the Court and given to this jury.
09:56:16 5 We developed strategy for voir dire, for analyzing jurors
09:56:19 6 in advance. I think the Court has had the benefit of
09:56:22 7 seeing the amount of work that was done by the defense in
09:56:25 8 this case in preparation for the actual voir dire of the
09:56:28 9 jurors. The summaries and the charts and the ranking of
09:56:32 10 jurors.

09:56:32 11 But I will tell you this. All that work was
09:56:35 12 done with the guiding principle that we were going to try
09:56:39 13 to pick a jury that would spare Mr. Democker's life if we
09:56:44 14 ever got to that penalty stage.

09:56:46 15 So as a result, and I think this is self
09:56:48 16 evident from the days we spent in here, our voir dire of
09:56:52 17 those jurors and the voir dire conducted by the
09:56:55 18 prosecution in this case, was largely related to their
09:56:59 19 attitude on the death penalty.

09:57:02 20 We were able to exclude a number of jurors
09:57:05 21 for hardship and for other cause before they ever came to
09:57:09 22 court, but of the jurors that were examined day against
09:57:12 23 day in court, the constant theme was their attitude on the
09:57:16 24 death penalty, and even when there were questions about
09:57:21 25 evidence and matters of fifth amendment law and other

09:57:25 1 sentence alternatives, it always came back to the death
09:57:28 2 penalty. It always came back to whether they could
09:57:31 3 understand mitigation, and they were given considerable
09:57:33 4 information in the questionnaire and they were questioned
09:57:37 5 harshly -- that is probably too tough a word -- they were
09:57:40 6 questioned with great precision and detail about
09:57:42 7 mitigation. And the State to their credit went to a great
09:57:46 8 deal of effort to explain mitigation to the jurors before
09:57:49 9 we had a chance to speak with them, because they went
09:57:52 10 first in every instance and they talked about the kind of
09:57:54 11 mitigation that this jury would hear.

09:57:56 12 And they talked to the jury about life as a
09:58:00 13 presumption and they talked to the jury about whether they
09:58:03 14 could give a life sentence and under what circumstances
09:58:06 15 could they give a life sentence, and we went through hours
09:58:08 16 and hours and hours of voir dire with the jurors about
09:58:11 17 those matters.

09:58:12 18 If this Court were to now try Mr. Democker
09:58:19 19 in a noncapital homicide case to this jury who we selected
09:58:25 20 with only the idea in mind that we would find a jury that
09:58:30 21 would give him a life sentence, we have not provided him
09:58:33 22 effective assistance of counsel, your Honor. I think that
09:58:35 23 seems to be obvious.

09:58:38 24 And we have a declaration from
09:58:40 25 Mr. Guastaferrero that he put together in a great rush for

09:58:43 1 us, but it's a thoughtful document and I would commend it
09:58:47 2 to your careful reading, your Honor. That document says
09:58:50 3 that if we had worked together on this as a noncapital
09:58:53 4 case, there would have been an entirely different jury
09:58:58 5 selection strategy and protocol developed and it would not
09:59:01 6 have in any way resembled what we did, but we did what we
09:59:06 7 did because this was a death penalty case.

09:59:10 8 Now, what does that mean? And I think we
09:59:13 9 have to think about whether Lockhart and Witherspoon and
09:59:18 10 this Eighth Circuit case somehow trump this particular
09:59:23 11 strategy, and it trumps in a way that requires going
09:59:27 12 forward with this death qualified jury.

09:59:30 13 The first thing I want to talk about is the
09:59:33 14 extraordinary idea that this jury now has punishment
09:59:36 15 information that cannot be scrubbed from their minds. We
09:59:40 16 all know that in noncapital cases, and generally felonies
09:59:43 17 and even in noncapital homicide cases, the jurors are
09:59:47 18 instructed frequently and routinely and consistently by
09:59:51 19 the Court that they are not to consider matters of
09:59:54 20 punishment. That that is not their concern and that
09:59:56 21 punishment is a matter for the Court, and they are not to
09:59:59 22 guess about what punishment might apply.

10:00:02 23 And there is sound policy behind that. We
10:00:04 24 all understand the sound policy behind that is that we
10:00:08 25 don't -- if jurors are not going to be involved in

10:00:10 1 sentencing, we don't want them to take into the jury room,
10:00:13 2 in deciding questions of guilt or innocence, some
10:00:16 3 speculation about what would or would not happen to a
10:00:19 4 defendant depending on a particular outcome, and that has
10:00:22 5 been the law in Arizona as long as I have practiced here.
10:00:25 6 It is the law in every state that I know of where juries
10:00:29 7 are not involved in sentencing and it makes good sense.

10:00:32 8 But compare that to what these jurors know.
10:00:35 9 These jurors know after careful voir dire individually for
10:00:40 10 every one of them, that there are two possible punishments
10:00:43 11 for murder in a capital context, death or life, and they
10:00:46 12 know further that life is divided into natural life and
10:00:50 13 life with possibility of release after 25 years.

10:00:52 14 They know that and that circumstance cannot
10:00:55 15 be scrubbed from their minds simply by instructing them
10:00:59 16 that they are not to consider punishment, because they
10:01:01 17 know what the punishment is going in. And so this jury
10:01:04 18 would start this trial possessed of information that had
10:01:08 19 we started as a noncapital case, they would not have been
10:01:10 20 given and they would have been told not to consider. And
10:01:14 21 I would submit, your Honor, there is no way to remove that
10:01:17 22 idea from their mind.

10:01:18 23 So this jury now would go forward with
10:01:23 24 information that they received from some source that is
10:01:26 25 not the evidence in this case, that is not information

10:01:28 1 that they would otherwise be permitted to have. So that
10:01:30 2 is a terribly important circumstance.

10:01:32 3 Now you would ask, I suppose, how is that
10:01:35 4 prejudicial to the defendant? Well, I think there are a
10:01:37 5 couple of obvious ways. One is that the jury, and we will
10:01:41 6 talk about this in more detail here shortly, but the jury
10:01:44 7 would be invited essentially inescapably to speculate
10:01:50 8 about what happened to the death penalty and what happened
10:01:52 9 to punishment and would be thinking that somehow this case
10:01:55 10 is less serious than it was when they last were in here
10:01:58 11 being questioned by us and may conclude that then somehow
10:02:02 12 it's okay to give Mr. Democker a life sentence, convict
10:02:07 13 him because somehow he escaped a more serious punishment
10:02:09 14 of death, and that's a concern. Maybe this is the point
10:02:13 15 to talk about the confusion and that issue.

10:02:19 16 In a similar vein, you raised yesterday,
10:02:23 17 your Honor, the prospect of individual voir dire of these
10:02:26 18 jurors after they are told that the death penalty is not
10:02:31 19 an issue in this case anymore.

10:02:32 20 Well, imagine from our point of view what we
10:02:36 21 think that ought to be like. We have told these jurors
10:02:40 22 repeatedly, you from the bench and the lawyers from both
10:02:45 23 tables, that they must be painstakingly honest with us and
10:02:48 24 we want their honest answers and that's the language from
10:02:51 25 that. But yet if we give the jurors some sort of sterile

10:02:56 1 polarized explanation, Ladies and Gentlemen of the jury,
10:03:01 2 you were questioned about the death penalty and related
10:03:04 3 matters, I am telling you as the judge the death penalty
10:03:07 4 is not an issue in this case. You are not to consider it
10:03:09 5 and put it out of your mind.

10:03:11 6 Do we really think, your Honor, for a moment
10:03:13 7 that that will be sufficient? We have provided you with
10:03:16 8 information from the capital jury project that suggests
10:03:19 9 strongly from real capital jurors that's not how they
10:03:23 10 operate. That they don't just say, oh, okay, I'll just
10:03:27 11 put that aside and not think about it. These jurors will
10:03:30 12 have to wonder what happened in this case.

10:03:33 13 So what do we tell them? Do we tell them
10:03:36 14 the truth? Do we tell them the painstaking truth that the
10:03:40 15 decision to seek death is the executive prerogative of the
10:03:43 16 elected County Attorney and that she made that decision
10:03:46 17 and it is her similar exclusive prerogative to take death
10:03:51 18 off the table, and that's what she did and no one is going
10:03:54 19 to ask any questions about why she waited until after the
10:03:57 20 jury was picked to do that.

10:03:58 21 And are we going to tell the jury that the
10:04:01 22 defendant had nothing to do with it, because here is our
10:04:03 23 concern. What if the -- what if one or more of the jurors
10:04:06 24 started thinking, well, may Mr. Democker cut some deal.
10:04:09 25 Maybe Mr. Democker pled guilty to something that we are

10:04:11 1 not going to be told about in exchange for taking death
10:04:14 2 off the table. Maybe Mr. Democker conceded some point of
10:04:17 3 evidence and we are going to take death off the table. We
10:04:19 4 will never know whether the jury is going to speculate
10:04:23 5 about those things or not, but the prejudice to
10:04:26 6 Mr. Democker is just as real in this case.

10:04:28 7 On the other hand, if we conduct individual
10:04:31 8 voir dire of the jurors and ask them those questions, it's
10:04:35 9 very much like asking jurors if they read a newspaper
10:04:38 10 article by showing them the newspaper article you don't
10:04:41 11 want them to read. If you tell the jurors don't think
10:04:44 12 that Mr. Democker cut some deal. Don't think that
10:04:47 13 Mr. Democker did anything. Just understand that this was
10:04:50 14 a random decision of the County Attorney that came down at
10:04:54 15 a very unfortunate time in this case. That's not being
10:04:57 16 painstakingly truthful to the jurors. How much detail and
10:04:59 17 how much information are they going to have to receive on
10:05:02 18 an individual basis before that individual juror is
10:05:06 19 convinced that it really is nothing they need to think
10:05:08 20 about.

10:05:08 21 And if you were thinking about individual
10:05:11 22 voir dire, who would conduct it and how would it be
10:05:13 23 conducted and what would the limits be? And how could we
10:05:16 24 set artificial limits on that voir dire until we knew what
10:05:19 25 each individual juror said.

10:05:22 1 And that raises a related point. We have
10:05:25 2 told -- beginning with Mr. Butner, and Mr. Papore on the
10:05:30 3 morning that Mr. Butner was not available -- we have told
10:05:32 4 I think every juror that they are going to hear
10:05:36 5 mitigation. That if we get to a penalty phase, they are
10:05:38 6 going to hear about Mr. Democker's life well led. They
10:05:40 7 are going to hear about his children. They are going to
10:05:42 8 hear about his parents. They are going to hear about his
10:05:44 9 brothers and sisters. They are going to hear about his
10:05:46 10 employment. They are going to hear about his good works
10:05:48 11 in the community. They are going hear about his lack of a
10:05:50 12 criminal record. We have essentially told them that if we
10:05:53 13 ever got to a penalty phase, they will hear that
10:05:55 14 information and we have told them in good detail what that
10:05:58 15 information would be.

10:05:59 16 Now, with this jury, we have to tell them in
10:06:02 17 addition to not thinking about the death penalty, don't be
10:06:04 18 disappointed that you will not hear a word of that
10:06:07 19 evidence. Don't guess or wonder why, but we are just
10:06:10 20 telling you here today, you will never hear a word about
10:06:13 21 any of those matters because it's no longer a part of this
10:06:16 22 case.

10:06:16 23 Wouldn't it be reasonable to assume one or
10:06:19 24 more of the jurors would say, well, there must be
10:06:22 25 something that Mr. Democker wants to hide. There must be

10:06:24 1 something about some of that evidence that just doesn't
10:06:28 2 make any sense, and why are we not going to hear that?
10:06:31 3 And maybe most importantly of all, why don't we have any
10:06:34 4 role in punishment? You spent all of this time and energy
10:06:37 5 an effort to tell us that we were the decision makers. We
10:06:40 6 were the ones that decide punishment and now you are
10:06:43 7 saying, no, you are not and you have no role in deciding
10:06:47 8 punishment in this case.

10:06:48 9 The level of juror confusion in this case,
10:06:51 10 your Honor, is not imaginary. It is not something we have
10:06:56 11 cooked up in the last 48 hours. I think it's real. I
10:06:59 12 think the Court can see that it's real and it's going to
10:07:03 13 be individualized. We're going to have 40 people or 39
10:07:06 14 people with, perhaps, 39 or 40 different understandings of
10:07:09 15 what you are telling them and different appreciations of
10:07:12 16 what that means and different thoughts going forward.

10:07:14 17 And as I said last week in general -- I said
10:07:17 18 earlier this week in general terms. Does seem like last
10:07:19 19 week. In general terms the expectation, maybe it's a
10:07:23 20 fictionalized expectation, but the expectation is that
10:07:25 21 when you start a trial, all of the jurors begin with a
10:07:28 22 tabula rasa, with a blank slate and that we tell them
10:07:32 23 repeatedly you must decide this case based only on what
10:07:35 24 you hear and see in this courtroom and on nothing else.
10:07:38 25 Don't research the case. Don't read about it. Don't do

10:07:40 1 anything else.

10:07:40 2 Well, for these reasons, we're about to
10:07:44 3 start a trial with a jury that is possessed of all
10:07:46 4 different kinds of information. The sentencing
10:07:50 5 information being the most improper of all, but we are
10:07:54 6 putting 12 people plus six alternates in the box who are
10:07:58 7 going to continue to speculate about what does this mean
10:08:02 8 and how did this happen? And what kind of a process is
10:08:06 9 this where we're picked to decide a death case and we
10:08:09 10 agree we will do that and now we are told, no, never mind.
10:08:11 11 It's going to be something else.

10:08:13 12 Let's go back look at the law and see if the
10:08:16 13 law instructs us in one direction or another. As I said,
10:08:20 14 the State when they -- and let's review one other thing,
10:08:24 15 and I don't think Mr. Butner and Mr. Papore would or could
10:08:26 16 disagree with this. In our last minute discussions, the
10:08:30 17 discussions about this death process began late Friday
10:08:32 18 afternoon. We had some informal conversations. One of
10:08:35 19 the things we told Mr. Butner and Mr. Papore was that if a
10:08:39 20 decision was made to take death off the table, that we
10:08:43 21 believed that a new jury would have to be impaneled, and
10:08:47 22 these deputies to their credit said that they thought that
10:08:51 23 was probably correct.

10:08:52 24 Even the day before yesterday, when they
10:08:54 25 arrived here with the stipulation, I don't think the Court

10:08:57 1 ever saw the stipulation, but a stipulation to dismiss
10:09:00 2 death, we had a discussion and that was still their
10:09:03 3 position.

10:09:03 4 The stipulation was confusing to us because
10:09:07 5 it wasn't just a stipulation to dismiss the death penalty,
10:09:09 6 it asked us on behalf of Mr. Democker to make some
10:09:12 7 agreements regarding sentencing factors, and we spent
10:09:16 8 about an hour-and-a-half here in the court room by
10:09:19 9 ourselves trying to figure out how that would work and the
10:09:23 10 complicated questions and the County Attorneys repaired
10:09:27 11 back to their office.

10:09:28 12 When they came back, we agreed that neither
10:09:31 13 side really understood what that stipulation was and they
10:09:34 14 had, as an alternate, the one sentence motion that they
10:09:39 15 presented to you and an order that you signed that had no
10:09:42 16 contingencies or requirements on any other matter. But
10:09:47 17 they always announced to us their position had shifted and
10:09:50 18 they believed that we could and should go ahead with this
10:09:53 19 jury, and they brought to the Court's attention Buchanan
10:09:57 20 versus Kentucky.

10:09:59 21 Buchanan versus Kentucky I think, your
10:10:02 22 Honor, can be easily separated and distinguished from this
10:10:05 23 case. In the Buchanan case, he went to trial joined with
10:10:10 24 a death eligible codefendant. He was originally charged
10:10:13 25 with capital murder. Death was taken off the table for

10:10:16 1 him, and he went to trial. But the decision, and this is
10:10:20 2 the principle difference, the decision in Buchanan to take
10:10:23 3 death off the table as to him was made before jury
10:10:25 4 selection and voir dire started.

10:10:27 5 Mr. Buchanan was convicted and complained
10:10:29 6 and said I shouldn't have been tried with -- to a death
10:10:33 7 qualified jury with my codefendant. There is a separate
10:10:36 8 question of whether Mr. Buchanan could have and would have
10:10:39 9 been entitled to a severance based on that fact.

10:10:42 10 I was involved in a capital case in federal
10:10:44 11 court in which that exact thing happened where my death
10:10:46 12 eligible client was joined with a juvenile codefendant who
10:10:50 13 under federal law was death ineligible. A motion to sever
10:10:53 14 was filed. It was denied and on the morning of jury
10:10:56 15 selection, the district judge sua sponte reconsidered and
10:10:59 16 granted the motion and severed the juvenile codefendant,
10:11:02 17 which I think was sound reasoning. And that motion, which
10:11:05 18 my colleague sent to me to remind me about it, began with
10:11:09 19 Buchanan and talked about the rub-off prejudice there.

10:11:13 20 But that is really not the problem. The
10:11:15 21 real holding, the core holding in Buchanan was that
10:11:18 22 whatever complaint Buchanan had about the death qualifying
10:11:23 23 process of the jury for his codefendant could have been
10:11:26 24 resolved, at least in the Court's view, by voir dire, and
10:11:29 25 the voir dire could have been pretty simple. Ladies and

10:11:31 1 Gentlemen, everything you heard about death and the death
10:11:34 2 process for the codefendant doesn't apply to me and he
10:11:37 3 could have said that pretty clearly, and I think the Court
10:11:40 4 said that's how he would have resolved the prejudice.

10:11:42 5 There are lots of other things about
10:11:44 6 Buchanan that seemed to call out for some different
10:11:47 7 answer, but that's really the principle difference between
10:11:49 8 Buchanan and this case.

10:11:51 9 In this case, we went through the death
10:11:53 10 qualifying process, and as I have said here this morning,
10:11:56 11 the voir dire in this case was death voir dire. It was
10:11:59 12 not anything else. It was death voir dire with a very
10:12:02 13 limited reaching out on a case by case as to jurors about
10:12:06 14 other things, but it was not in any way the voir dire that
10:12:08 15 Mr. Guastaferrero tells you in his declaration. He would
10:12:12 16 have recommended and you can be sure we would have
10:12:15 17 conducted in this case were death not the principle issue.

10:12:17 18 The response filed by the State today
10:12:24 19 logically points to Lockhart, and it says then in the
10:12:28 20 second basis that Arizona has never held a death qualified
10:12:32 21 jury's conviction prone. Cites State versus Anderson, a
10:12:37 22 case we know about, but again that's this proposition, you
10:12:42 23 know, in a vacuum that says that a death qualifying jury
10:12:45 24 can be fair and impartial, which was the question you
10:12:47 25 posed to me.

10:12:48 1 But my answer to you, which was pretty short
10:12:52 2 last week, which was no, they are not fair and impartial,
10:12:56 3 applies to the facts in this case for these reasons.

10:13:00 4 The State actually goes so far as to say
10:13:02 5 time and cost involved in calling an entirely new panel
10:13:05 6 must be considered, and I think that is self evident.
10:13:08 7 Yes, it must be considered, but it must weighed against
10:13:11 8 the constitutional rights of Mr. Democker to be tried by a
10:13:14 9 fair and impartial jury.

10:13:14 10 And I think that relying upon Buchanan and
10:13:18 11 Witherspoon and Anderson for the generalized proposition
10:13:22 12 there is nothing inherently unfair about a death qualified
10:13:24 13 jury focuses too much on whether or not the science
10:13:29 14 supports the argument that they are more or less
10:13:31 15 conviction prone.

10:13:32 16 That is not the argument that I am making to
10:13:34 17 you here today, your Honor. I am saying even if you
10:13:37 18 accept, which I think from what you have said, you
10:13:39 19 probably do, the general concept that a death qualified
10:13:43 20 jury is not inherently more conviction prone and therefore
10:13:47 21 unfair, doesn't address the unique in all the world
10:13:52 22 circumstance that we find ourselves in here.

10:13:55 23 And I think there are more good reasons to
10:13:58 24 think about how the trying of this case to a death
10:14:02 25 qualified jury impacts Mr. Democker, beginning with the

10:14:06 1 sixth amendment ineffective assistance of counsel argument
10:14:09 2 that is plain, and it doesn't please me or Mr. Hammond or
10:14:13 3 Ms. Chapman to suggest that, but it's just true. It is
10:14:16 4 just true. That we are in no way -- no way apologetic for
10:14:24 5 how we picked this jury, because we picked the jury based
10:14:27 6 on our good faith belief and the Court's good faith belief
10:14:30 7 that we were proceeding as a death case, only to have that
10:14:32 8 derailed after the jury was picked.

10:14:34 9 Then we have to take up the separate
10:14:36 10 Witherspoon question and we have raised this and this is
10:14:39 11 another serious problem in this case. Going back to the
10:14:45 12 process, if you remember what we did, we came to court
10:14:48 13 with lists of jurors from the questionnaires from the 315
10:14:52 14 questionnaires and we told the Court and we told the
10:14:56 15 prosecutors in this case, that we were going to approach
10:14:59 16 the idea of meeting and conferring and striking jurors off
10:15:03 17 the questionnaire in good faith, and that among the things
10:15:05 18 that we would do would be not to unreasonably cling to
10:15:10 19 Witherspoon excludable jurors. And that we would not try
10:15:14 20 unreasonably to rehabilitate, to waste everybody's time
10:15:17 21 and bring in clear Witherspoon excludables and voir dire
10:15:20 22 them and we did that.

10:15:22 23 And unfortunately Mr. Guastaferrero is home in
10:15:26 24 Atlanta preparing for a trial in Detroit. We were going
10:15:28 25 to try and go back through our records and see if we could

10:15:31 1 reconstruct for you examples of jurors, your Honor, that
10:15:35 2 we excluded summarily off their questionnaires who were
10:15:39 3 Witherspoon excludable, but for whom that was the only
10:15:42 4 basis for them being excluded.

10:15:44 5 And so what has happened is because of the
10:15:48 6 circumstances, people who were otherwise eligible to be
10:15:51 7 considered as potential jurors were excluded based on
10:15:54 8 their Witherspoon beliefs in a case that turns out to be a
10:15:57 9 noncapital case, and so Mr. Democker then has a jury pool
10:16:02 10 to work with and a jury pool winnowed down to make strikes
10:16:07 11 from, that excluded people who were removed from jury
10:16:10 12 service only for the reasons connected to their beliefs
10:16:12 13 about the death penalty.

10:16:14 14 And we know, I think it just goes without
10:16:16 15 saying, that in a noncapital case, moral opposition to the
10:16:20 16 death penalty is not a disqualifying circumstance. And
10:16:23 17 there may have been many other things about those jurors
10:16:25 18 that would have endeared them to one side or the other, so
10:16:29 19 that they would not have been removed.

10:16:30 20 Then you move to the process of actual voir
10:16:34 21 dire, and there were jurors who were removed over our
10:16:37 22 objection for their Witherspoon views, who came in, and
10:16:41 23 there were jurors, whom after they came in and made it
10:16:45 24 clear in voir dire, that what they said in their
10:16:47 25 questionnaire was not even as profound as their anti-death

10:16:53 1 penalty views turned out to be when they came to court,
10:16:55 2 those people we agreed to excuse.

10:16:57 3 So there is a significant number of people
10:16:59 4 missing from this jury pool, your Honor, who were excused
10:17:03 5 for no other reason than their Witherspoon beliefs.

10:17:06 6 Then there was an additional class of people
10:17:09 7 who were not Witherspoon excludable, but for one reason or
10:17:13 8 another either based on some dawning recognition or
10:17:18 9 realization that this was going to be a serious death
10:17:20 10 penalty case and that they might have to cast a vote to
10:17:23 11 take the life of another citizen decided they didn't want
10:17:26 12 any part of it, and I think the Court can remember that
10:17:28 13 there were more than one of those jurors who decided after
10:17:33 14 going through this process, that this wasn't for them, and
10:17:36 15 we let those people go. And to their credit, the State
10:17:39 16 thought that those people shouldn't sit on a death penalty
10:17:43 17 jury and did not unreasonably try to cling to them in this
10:17:46 18 case.

10:17:46 19 So those are people who I think both sides
10:17:48 20 would have concluded were otherwise qualified to go, but
10:17:52 21 were excused because of their death penalty view. The
10:17:55 22 record will be a bit murky on this because one of the
10:17:59 23 things we did, which I think in hindsight we probably
10:18:01 24 should have been more careful about, was to excuse people
10:18:04 25 for hardship when really everyone in the room understood

10:18:07 1 it was really for cause, and I think part of that was not
10:18:10 2 to offend the sensibility of the juror. I am not sure we
10:18:13 3 made the clearest record we could have about jurors who
10:18:16 4 were excused ostensibly for hardship who were really cause
10:18:20 5 jurors. We were sort of hit or miss on that, and we will
10:18:23 6 take some measure of responsibility for that process.

10:18:26 7 But nonetheless, the jury pool that came to
10:18:30 8 court is different than the jury pool that would have come
10:18:32 9 to court had this been a noncapital case from the git-go,
10:18:36 10 and Mr. Democker would have had the opportunity and what
10:18:40 11 we think is a six amendment right to a trial by fair and
10:18:43 12 impartial jury, which is also concurrently a right under
10:18:46 13 the Arizona Constitution. I think it's Article 2, Section
10:18:50 14 22 perhaps. I am not as conversant with the Arizona
10:18:54 15 Constitution as I used to be, but there is a corresponding
10:18:58 16 provision in the Arizona Constitution that requires a
10:19:00 17 trial by a fair and impartial jury.

10:19:01 18 So we have a temptation to over read
10:19:05 19 Lockhart and Buchanan for a generalized proposition that
10:19:09 20 death juries are fair and impartial and say, well, if
10:19:12 21 that's the case, then how can Mr. Democker possibly
10:19:15 22 complain.

10:19:16 23 These are all the reasons and the reasons I
10:19:19 24 think that you can't simply fall back on Lockhart and
10:19:24 25 Buchanan for comfort and solace in the idea that death

10:19:28 1 qualified jurors are fair and impartial is that in
10:19:32 2 Lockhart and in the Eighth Circuit case, Mr. Leapley's
10:19:36 3 case, and in Witherspoon and those cases, those people all
10:19:40 4 had differing circumstances. None of them went through
10:19:43 5 the process of death qualifying a jury only to have the
10:19:47 6 trial begin with the matter as a non-death case. That's a
10:19:52 7 very different circumstance. That is a very different
10:19:54 8 circumstance. It's not Mr. Buchanan's case. It is not
10:19:57 9 Mr. Lockhart's case, and there is no other case that we
10:20:01 10 can find, your Honor, in the brief amount of time that we
10:20:04 11 have had to look at this of working essentially around the
10:20:08 12 clock the last few days. There is no other case in
10:20:09 13 Arizona.

10:20:10 14 There is no other case in the United States
10:20:11 15 of America that we can find that would propose to put a
10:20:16 16 man in the position that Mr. Democker finds himself in,
10:20:19 17 which is having a death qualified jury selected by lawyers
10:20:23 18 who were focused like a laser beam on the death penalty on
10:20:27 19 both sides and by a Court that was inquiring of death
10:20:30 20 penalty views on a non-death penalty case -- on a
10:20:33 21 non-death penalty case.

10:20:35 22 And it is not simply that idea that is
10:20:38 23 offensive to due process and to the sixth amendment
10:20:42 24 rights, it's the particular dilemma that is created by the
10:20:44 25 way this happened and the fact that these jurors have in

10:20:47 1 their minds improper information about punishment.

10:20:51 2 And it's not just the jurisprudence about
10:20:55 3 fair and impartial that should drive this decision. It's
10:20:58 4 the real world dilemma of how do we deal with these jurors
10:21:02 5 collectively to tell them this and individually and do we
10:21:06 6 really understand that all of the scientific studies and
10:21:11 7 particularly the capital jury project that say those kind
10:21:14 8 of put-this-out-of-your-mind instructions have no effect
10:21:17 9 on a jury whatsoever. Do we honestly believe that this
10:21:21 10 jury will come to court with the speedometer set back to
10:21:26 11 zero -- the odometer set back to zero? They are going to
10:21:27 12 come back to court with preconceived ideas and
10:21:29 13 expectations in this case and a level of confusion that is
10:21:33 14 intolerable and unconstitutional.

10:21:38 15 It's expensive and inconvenience, we will
10:21:40 16 give you that. We think we can put together very quickly
10:21:43 17 a fair proposal which we hope the Court and the State
10:21:47 18 would agree to, much as they did our proposal for picking
10:21:50 19 this death qualified jury that would expeditiously pick a
10:21:54 20 jury in this case.

10:21:55 21 But the time we would spend trying to unring
10:21:59 22 this bell is time that would be better spent picking a new
10:22:04 23 jury to afford Mr. Democker his constitutional rights.

10:22:07 24 Just doing the math. If we had 40 jurors
10:22:10 25 and we spent ten minutes individually talking to them, I

10:22:14 1 believe that's six-and-a-half hours with no breaks. So we
10:22:18 2 are talking about taking more than a day to talk to every
10:22:21 3 juror and we have -- and since we're doing this totally
10:22:26 4 blind and having no idea, at least I have no idea of going
10:22:29 5 in, what we would really say to them and how we would
10:22:31 6 answer their questions and what level of questions would
10:22:34 7 be permitted by them. If they asked specific detailed
10:22:38 8 questions, would we want to go in and tell them specific
10:22:41 9 details about how death came to be off the table in this
10:22:45 10 case and if they didn't ask questions, would we be
10:22:47 11 comfortable with the idea that they would accept the
10:22:49 12 instruction and would do that.

10:22:51 13 All of the problems that Morgan tells you
10:22:53 14 about with jurors who express ideas that would exclude
10:22:58 15 them from jury service only to be rehabilitated by
10:23:02 16 questions like will you follow the Court's instruction, we
10:23:04 17 know that the jurisprudence on that matter says that's not
10:23:08 18 enough. That deeply held beliefs cannot be cured by
10:23:11 19 simply asking people whether they will follow the law and
10:23:15 20 follow the instructions.

10:23:16 21 So why would we think for a minute that we
10:23:20 22 could go to these jurors and say you came in here and were
10:23:24 23 talked to endlessly about death and your attitudes about
10:23:27 24 death and made to think and speak in public about the
10:23:29 25 death penalty. Now we are not going to talk about that.

10:23:32 1 Just trust us on this. That it's just okay. Just don't
10:23:35 2 think about that. Do we really honestly believe among
10:23:39 3 ourselves that that would be sufficient to wipe that from
10:23:42 4 their minds.

10:23:43 5 And I would tell you, your Honor, that every
10:23:45 6 scientific study and all of my experience and the
10:23:48 7 experience of my colleagues and the experience of this
10:23:51 8 band of capital defense lawyers says just the opposite.
10:23:55 9 It says that these are matters that would be so much in
10:24:00 10 the minds of these jurors, that the fairness of the trial
10:24:04 11 would begin badly crippled. It would begin with jurors
10:24:08 12 who would be questioning things and questioning things as
10:24:11 13 the trial went along that we would never know about. We
10:24:13 14 would just never know.

10:24:14 15 Mr. Democker is entitled to a trial by
10:24:17 16 jurors who do not suffer from that. It may be expensive
10:24:21 17 to the county. It may be expensive to taxpayers. It may
10:24:25 18 be wildly inconvenient to the Court, but I think those
10:24:28 19 matters have to be put aside in this case.

10:24:30 20 It would be wildly inconvenient and
10:24:33 21 expensive to the county if we do this wrong and if you
10:24:36 22 become the first judge in the United States to so find in
10:24:41 23 this case and it turns out that you're not right in this
10:24:44 24 case. The cost would be, I submit, far greater if that's
10:24:49 25 the way we went.

10:24:50 1 But, more importantly, the rights of
10:24:53 2 Mr. Democker are at stake in this case and if we're going
10:24:57 3 to come down on one side or the other in this case, your
10:24:59 4 Honor, I think everything we have told you should move us
10:25:02 5 towards quickly dismissing this jury, bringing in a new
10:25:07 6 jury and getting about the business of trying this case
10:25:09 7 the way it needs to be tried.

10:25:10 8 Thank you, your Honor.

10:25:11 9 THE COURT: Do you have some idea of how long you
10:25:17 10 are going to take, Mr. Butner?

10:25:18 11 MR. BUTNER: Yes. Significantly less than
10:25:21 12 Mr. Sears.

10:25:26 13 Judge -- first of all, may I proceed?

10:25:28 14 THE COURT: Yes.

10:25:28 15 MR. BUTNER: Thank you.

10:25:29 16 I would like to make it clear that the State
10:25:31 17 did not, and I am sure you recall, did not agree with the
10:25:35 18 jury selection method that ultimately we landed upon. In
10:25:41 19 fact, we wanted something significantly different.

10:25:45 20 Secondly, I would note that during the
10:25:49 21 entire process of jury selection, Mr. Sears always was
10:25:55 22 arguing that the State should dismiss the death penalty,
10:25:59 23 both on and off the record, and I think the Court will
10:26:04 24 recall and I repeatedly said it, that the State and myself
10:26:08 25 personally, quite frankly, were always considering the

10:26:14 1 possibility of dismissing the death penalty. I think I
10:26:18 2 stated on the record that it was an ongoing process and in
10:26:22 3 fact it was.

10:26:25 4 The primary -- the reason the State
10:26:29 5 dismissed the death penalty were the strong views of the
10:26:33 6 victims in this case and ultimately when faced with the
10:26:39 7 prospect of proceeding with the death penalty trial and
10:26:43 8 not having the full support of the victims in this case,
10:26:48 9 we believed that was just not the appropriate way to go.

10:26:53 10 So there it is for the record as to why the
10:26:56 11 State dismissed the death penalty.

10:27:01 12 Now, in terms of the voir dire process, I
10:27:05 13 would submit that the Court watched the voir dire process,
10:27:10 14 presided over the voir dire process, participated in the
10:27:13 15 voir dire process, and you know as well as everybody else
10:27:17 16 that was in the process, that although there was a
10:27:20 17 significant degree of emphasis on the death penalty, it
10:27:25 18 was not, quote, laser focused on the death penalty. That
10:27:30 19 other issues were discussed. Particularly evidentiary in
10:27:33 20 nature in that voir dire process in an effort on the part
10:27:41 21 of everybody to select a fair and impartial juror in this
10:27:46 22 case.

10:27:46 23 And one of the areas of questioning
10:27:48 24 throughout the voir dire process was whether each and
10:27:53 25 every juror in this case would be able to separate the

10:27:57 1 issue of punishment from the issue of guilt and innocence.
10:28:05 2 And all of the jurors qualified in this case, to the
10:28:09 3 satisfaction of the Court and counsel, indicated in some
10:28:15 4 fashion that they were able to do that.

10:28:18 5 So what we have here is basically a jury
10:28:23 6 that has been determined to be able to separate the issue
10:28:28 7 of punishment from the issue of guilt and innocence, and
10:28:32 8 has been determined to be a fair and impartial jury on
10:28:38 9 this first degree murder case.

10:28:40 10 And again, of course, we go back to the
10:28:44 11 Lockhart versus McCree decision where it was clearly
10:28:48 12 determined that death qualification of a jury does not
10:28:51 13 violate the defendant's right to a fair trial, and then
10:28:55 14 the Buchanan versus Kentucky decision where it was also
10:28:58 15 clearly determined that a death qualified jury does not
10:29:02 16 violate the defendant's sixth amendment right to a fair
10:29:07 17 and impartial jury.

10:29:08 18 And I cite again, as it was cited in our
10:29:14 19 brief, constitutional challenges to use of a death
10:29:18 20 qualified jury in the guilt-innocence portion of the trial
10:29:22 21 have been soundly and repeatedly rejected. U.S. versus
10:29:27 22 Brown. It's in our brief.

10:29:29 23 When this prospect first came up, we cited
10:29:35 24 to the Court the McDowell versus Leapley case at 984 Fed.
10:29:41 25 2nd 232, the Eighth Circuit case from 1993, where even at

10:29:46 1 the late stage of the proceedings where the jury had
10:29:49 2 already deliberated on guilt and innocence and returned a
10:29:53 3 guilty verdict, and at that point the prosecutor
10:29:56 4 determined that there was appropriate reasons for
10:30:00 5 dismissing the death penalty, the Court held -- the Eighth
10:30:06 6 Circuit court held that there was nothing constitutionally
10:30:08 7 impermissible about that. Even if the prosecutor had done
10:30:12 8 that as a ploy and apparently there was some degree of
10:30:17 9 concern that may have been done in that particular case.
10:30:21 10 There is nothing to indicate that was done in this case.
10:30:24 11 Nothing.

10:30:25 12 Judge, we have gone through a tremendous
10:30:30 13 amount of time and effort, all of us in this room, and all
10:30:36 14 of those jurors have gone through and expended a
10:30:41 15 tremendous amount of time and effort in some circumstances
10:30:47 16 to lay their souls bare, and all of us have concluded that
10:30:53 17 we have a fair and impartial jury and to set all of this
10:30:58 18 aside and start over again is certainly not appropriate,
10:31:04 19 certainly not required. Certainly not the state of the
10:31:09 20 law in the State of Arizona.

10:31:11 21 I would ask that the defense motion be
10:31:13 22 denied.

10:31:13 23 Thank you.

10:31:15 24 THE COURT: Mr. Sears.

10:31:16 25 MR. SEARS: Let me start if I might with.

10:31:20 1 Mr. Butner's statement now that it was largely the strong
10:31:24 2 views of the victims that caused this decision to be made.
10:31:31 3 I respectfully point out that the victim's mother has been
10:31:38 4 present for most of the jury selection. I don't recall
10:31:40 5 the precise day, but she was here before Mr. Democker's
10:31:42 6 mother arrived. She has been in direct contact. I
10:31:47 7 watched her be in direct contact with the prosecutors.

10:31:49 8 I do not understand why they would wait
10:31:53 9 until after the jury selection process and voir dire is
10:31:58 10 complete to then assess her strong views.

10:32:01 11 My suspicion, your Honor, is that they
10:32:04 12 either could have or did have -- know Ms. Kennedy's strong
10:32:09 13 views opposing the death penalty in this case for some
10:32:12 14 greater time than over this past weekend, and it is
10:32:18 15 Mr. Democker -- it is Mr. Democker who is prejudiced as a
10:32:24 16 result of whatever delay was caused.

10:32:26 17 I am still resisting the temptation to say
10:32:29 18 that this was a ploy or that Sheila Polk acted in bad
10:32:33 19 faith because I have no proof of that, your Honor, and if
10:32:35 20 I did, I think we would be doing something entirely
10:32:39 21 different here in this case.

10:32:39 22 Nonetheless, the inescapable fact is that
10:32:44 23 the decision to take death off the table was made at a
10:32:48 24 very late date, but one that puts us in a posture utterly
10:32:52 25 different than Buchanan, utterly different than Leapley,

10:32:55 1 and utterly different than Mr. Lockhart in this case.

10:33:00 2 In the Leapley case, the Eighth Circuit
10:33:03 3 case, the judge was faced -- and you have to understand
10:33:06 4 there are some things about this case that are not readily
10:33:09 5 apparent from this, unless you are a death penalty lawyer,
10:33:13 6 I think, like those of us at this table, but this is a
10:33:17 7 federal habeas review of a state court conviction, a South
10:33:22 8 Dakota conviction. South Dakota.

10:33:24 9 I will just tell you, your Honor, as I am
10:33:26 10 sure you know, that federal habeas law is full of
10:33:31 11 tripwires for defendants who want to come to federal court
10:33:34 12 and attack a state court conviction and the burden on a
10:33:38 13 state court defendant to get federal habeas relief is a
10:33:42 14 monumental one that has to prove some fundamental
10:33:46 15 constitutional violation committed in the state court.

10:33:50 16 And then there are many other places in the
10:33:54 17 Antiterrorism and Effective Death Penalty Act that governs
10:33:57 18 federal habeas that put preclusion barriers of the first
10:34:01 19 magnitude in front of people like Mr. Leapley who are
10:34:03 20 trying to get federal relief, but in that case, I think
10:34:07 21 there is a practical issue that is different than the
10:34:08 22 practical issue here.

10:34:10 23 The decision, whether it was a ploy or not,
10:34:12 24 to take death off the table was done only after
10:34:16 25 Mr. Leapley was convicted by this death qualified jury.

10:34:19 1 As the trial progressed in that case, Mr. Leapley was at
10:34:22 2 every moment exposed to the death penalty. To
10:34:26 3 Mr. Leapley's good fortune, perhaps, he was spared the
10:34:31 4 death penalty in that case, but he began to complain about
10:34:35 5 just the idea that he was tried by this death qualified
10:34:38 6 jury.

10:34:38 7 Well, I don't think it takes much to see
10:34:40 8 that the -- the huge difference and distinction between
10:34:45 9 where we find ourselves today and where Mr. Leapley found
10:34:48 10 himself after he was convicted.

10:34:49 11 There is an opportunity and the opportunity
10:34:52 12 exists now, until the jury is sworn, to solve that problem
10:34:56 13 in a way that protects the rights of Mr. Democker in this
10:35:00 14 case, and I hesitate to say rewards the County Attorney
10:35:04 15 for waiting until the very last minute to do this, but to
10:35:07 16 be blunt, that's one of the corollary consequences of
10:35:11 17 going forward with this death penalty jury.

10:35:13 18 A cynical person, a person more cynical than
10:35:17 19 me perhaps, your Honor, would say that if this were the
10:35:20 20 rule, there would be nothing to prevent any prosecutor
10:35:22 21 from noticing death to get themselves a death qualified
10:35:25 22 jury, knowing that they never intend to go forward.
10:35:27 23 Dismissing death and having that death qualified jury
10:35:30 24 decide the fate of a person who is not death eligible.

10:35:35 25 Again, I am not suggesting that was what was

10:35:40 1 afoot in this case, but that is a prospect that if you
10:35:43 2 become the first judge in the United States to make such a
10:35:46 3 ruling, there is some message that gets sent to less
10:35:50 4 honest and less responsible prosecutors that this is a way
10:35:54 5 to proceed. It's a shocking prospect.

10:35:57 6 I didn't hear anything from Mr. Butner about
10:35:59 7 the exclusion of jurors with moral qualms about the death
10:36:02 8 penalty, and that is a fundamental concern of Mr. Democker
10:36:08 9 going forward in this case.

10:36:10 10 Mr. Democker is going to be tried to a jury,
10:36:16 11 and you can say whatever you will about the jury we have,
10:36:18 12 but what you can't say is anything about the jury we do
10:36:21 13 not have and about the jury pool that could have been
10:36:24 14 comprised of those people who were excluded by stipulation
10:36:28 15 and on motion over objection solely and entirely because
10:36:32 16 of their anti-death penalty views in this case.

10:36:34 17 I don't think anyone could seriously argue
10:36:37 18 that Mr. Democker is without the right to have jurors with
10:36:42 19 moral qualms about the death penalty on his jury in a
10:36:45 20 non-death penalty case. There is a disconnect there that
10:36:49 21 seems patently obvious in this case. It would have been
10:36:53 22 wrong for you if we were trying this case and picking the
10:36:59 23 jury as a non-death case had this decision been made
10:37:02 24 months ago. It would have been clearly wrong for you to
10:37:04 25 exclude jurors on the grounds of their opposition to or

10:37:09 1 vigorous support for the death penalty if that was the
10:37:12 2 only basis for excluding them. We all understand that.

10:37:14 3 The cases beginning with Buchanan and some
10:37:19 4 other cases led to a sort of subcategory of death
10:37:24 5 qualified jury cases that I called bifurcations cases, and
10:37:29 6 the complaints have been raised in a number of cases, some
10:37:33 7 of which have been cited by us and the State, to people
10:37:36 8 who are on trial facing death to the idea that they should
10:37:41 9 receive a guilt-innocence trial from a non-death qualified
10:37:46 10 jury and that only if that trial results in a conviction
10:37:51 11 should the Court convene a second jury.

10:37:53 12 There are lots of cases that talk about that
10:37:56 13 and Leapley is one of the obvious ones, which is the
10:38:00 14 one -- and some of other cases we pointed you to -- is
10:38:03 15 that there is no support for that proposition. That is
10:38:05 16 actually what Lockhart is talking about, which is, there
10:38:08 17 is no -- at least the state of jurisprudence since 1986,
10:38:12 18 since the decision of Lockhart, there is no fundamental
10:38:14 19 sixth amendment violation by trying a death eligible
10:38:18 20 defendant in front of a death qualified jury and nothing
10:38:21 21 that requires a second jury to be impaneled.

10:38:24 22 There were also decisions that you have seen
10:38:25 23 that say that's an easy decision for the Court to make,
10:38:28 24 because it simply violates the federal death penalty act
10:38:30 25 in federal court because there is no provision for a

10:38:33 1 second jury.

10:38:33 2 We actually made that motion to you in this
10:38:35 3 case. I am sure you recall that, your Honor. We
10:38:37 4 suggested that in this case in the absence of any Arizona
10:38:40 5 authority, it might be appropriate to consider that. That
10:38:42 6 was seriously briefed and argued and you denied that
10:38:46 7 request in this case.

10:38:47 8 But that's not why we're here. We're here
10:38:50 9 because of a unique once in a lifetime never seen before
10:38:54 10 and maybe never seen again set of facts that separates
10:38:56 11 Mr. Democker's case from every other capital case that we
10:38:59 12 know anything about, past or present in this case, and it
10:39:04 13 puts Mr. Democker in the impossible position, we suggest,
10:39:10 14 of being tried in short notice to a jury that was picked
10:39:15 15 on entirely different premises in this case.

10:39:18 16 And I would respectfully disagree with
10:39:22 17 Mr. Butner about the nature of the voir dire process and I
10:39:26 18 do not think that it would be the Court's observation that
10:39:29 19 the death penalty process was anything other than death
10:39:31 20 focused. Every single juror was questioned about the
10:39:34 21 death penalty extensively. Every single juror was
10:39:37 22 questioned about the intricacies of the last 19 questions
10:39:42 23 of the questionnaire regarding the interchange between
10:39:44 24 life as a sufficiently severe punishment. Would they
10:39:49 25 accept mitigation. There were many, many questions and

10:39:53 1 discussions and even arguments to the Court about whether
10:39:55 2 a particular juror was or was not excludable based on
10:39:59 3 those views.

10:40:00 4 They were also told, every single one of
10:40:02 5 them, about mitigation. They were told something about
10:40:04 6 the evidence in the case, and that began, I think, in
10:40:08 7 every single case that Mr. Butner did. I am not sure if
10:40:11 8 Mr. Papore picked this up for the few jurors he did. But
10:40:14 9 I do not remember a juror that Mr. Butner spoke to that
10:40:17 10 didn't hear about DNA under the fingernails and didn't
10:40:21 11 hear about Mr. Butner and his wet footprint in the shower,
10:40:25 12 even though we did our best to disabuse Mr. Butner of that
10:40:30 13 example.

10:40:32 14 We also --

10:40:33 15 THE COURT: Or maybe just abuse him because of
10:40:35 16 the example.

10:40:36 17 MR. SEARS: You know, I've just got a mental
10:40:37 18 picture, your Honor, that I just -- if you want a real
10:40:41 19 example about how hard it is to get something out of your
10:40:43 20 mind, your Honor -- I --

10:40:46 21 MR. BUTNER: Stop. Stop.

10:40:46 22 MR. SEARS: I went to sleep and I woke up
10:40:48 23 thinking about that one. I much favored "it snowed
10:40:52 24 overnight." I thought that was a far better example, your
10:40:57 25 Honor, except that is actually direct evidence, but -- the

10:41:01 1 point is this, your Honor: That as sometimes happens,
10:41:07 2 cases wind up in a posture that is unique unto all the
10:41:11 3 world and this is one of those cases, and I sincerely tell
10:41:17 4 you that despite every effort we have made, we cannot find
10:41:20 5 another single case, anywhere, starting with Arizona, but
10:41:23 6 anywhere that we have looked and that our colleagues have
10:41:26 7 looked for us that put a judge in the position that you
10:41:30 8 are in now to do this.

10:41:31 9 And so as the Court is often heard to say,
10:41:36 10 there are some binary decisions here and the first binary
10:41:39 11 decision I think is this jury or some other jury, and if
10:41:44 12 you look at what's on the side of this jury, the State has
10:41:48 13 actually gone so far to say in their response here, that
10:41:51 14 you should look at the cost and inconvenience.

10:41:54 15 Of course. Of course you should. We are
10:41:57 16 not blind to that. This has been a terribly expensive
10:42:00 17 trial for both sides in this case and for the Court up to
10:42:03 18 this point.

10:42:03 19 But to say that is a tipping point and that
10:42:06 20 is a place in which we can make a decision that is a brand
10:42:12 21 new statement of law in this state and in the United
10:42:14 22 States because of cost and economics, I don't imagine that
10:42:18 23 the Court would go there. That is something to be
10:42:20 24 considered, but it is not a basis for making a decision of
10:42:24 25 this constitutional magnitude in this case.

10:42:26 1 Mr. Democker and the Court did nothing to
10:42:29 2 put us where we're today. In fact, this Court and
10:42:34 3 Mr. Democker did a number of things trying to prevent this
10:42:38 4 day from happening by encouraging the State to make the
10:42:42 5 decisions that it ultimately made sooner rather than later
10:42:45 6 and to say that Mr. Determine should be at the short end
10:42:50 7 of the stick here because of that decision seems to us as
10:42:54 8 a matter of fundamental fairness the wrong place to be
10:42:57 9 looking here.

10:42:57 10 I am not suggesting that the Court should
10:42:59 11 impose costs on the State for their delay in doing this.
10:43:03 12 I don't have a basis for saying that, your Honor, and I
10:43:05 13 wouldn't urge that unless I had different and other
10:43:08 14 information to say that.

10:43:09 15 But to say that Mr. Democker should be tried
10:43:14 16 to this jury for those reasons and if the Court is relying
10:43:17 17 simply on Lockhart and Anderson, which is really the
10:43:21 18 Arizona case that just repeats the Lockhart mantra for the
10:43:26 19 general proposition that how can you complain death
10:43:30 20 qualified jurors are fair and impartial, does not address
10:43:34 21 the unique situation we are in here and the
10:43:37 22 impossibilities of trying to talk our way out of this with
10:43:40 23 the jury and trying to be fair and painstakingly honest to
10:43:45 24 this jury about what just happened here and what they are
10:43:48 25 going to do going forward.

10:43:50 1 We would dig ourselves down into so many
10:43:52 2 holes with those jurors and the more we talk to them, the
10:43:55 3 more questions that they are likely to have, the more
10:43:57 4 questions we would think of, the more things we would want
10:43:59 5 to know about, the more time we would spend, I suggest
10:44:03 6 that we would be well down the road to picking a new jury
10:44:06 7 by the time we finished with that and what if -- what if
10:44:10 8 out of 39 jurors, seven or eight or nine or ten of them
10:44:14 9 said something about this that caused us all to step back
10:44:19 10 and say, oh, well, there's the problem. There it is.
10:44:22 11 They have said something now. That person can't serve.

10:44:25 12 Now we have decimated our own pool because
10:44:29 13 we don't have that much of a cushion to the point where we
10:44:32 14 can't pick that jury, but if we take a couple of days of
10:44:36 15 individual voir dire to get there.

10:44:37 16 Now, by contrast, what if we don't have
10:44:39 17 individual voir dire. What if we back up and say we are
10:44:42 18 just going to give them instructions. What do those
10:44:44 19 instructions look like? What do you tell the 40 assembled
10:44:48 20 about this? You give them just this much information. Is
10:44:50 21 that really painstakingly honest with them? I think we
10:44:53 22 owe that to them. We ask that of them. I think we owe it
10:44:56 23 back to them under this once in a lifetime circumstance
10:44:59 24 and if we are not painstakingly honest with them, do we
10:45:02 25 sincerely and honestly believe that's good enough for

10:45:05 1 Mr. Democker, and we just know that it isn't.

10:45:08 2 Thank you.

10:45:09 3 THE COURT: Thank you.

10:45:11 4 Here's my thoughts on this. I will grant
10:45:18 5 that the timing of the decision was instrumental in making
10:45:30 6 this a somewhat unique circumstance, but on the other
10:45:35 7 hand, though the jury was quizzed about the death penalty
10:45:40 8 and with a lot of questions, they were also quizzed in a
10:45:45 9 jury questionnaire that addressed a lot of issues that
10:45:49 10 were other than death penalty issues.

10:45:53 11 And when they were brought in for individual
10:45:58 12 voir dire, the Court gave each group, if not each, a
10:46:10 13 statement of what was happening in the course of the
10:46:13 14 individual voir dire as well, and in that statement, the
10:46:21 15 Court made it, I think, abundantly clear, that in most
10:46:26 16 criminal cases the jury only determines whether the
10:46:30 17 accused is guilty or not guilty and for those defendants
10:46:34 18 whom the jury finds guilty, the question of sentence is
10:46:37 19 then decided by the judge.

10:46:41 20 And I explained whenever a defendant is
10:46:43 21 charged with a crime which carries the death penalty as a
10:46:46 22 possible sentence, then the jury decides not only the
10:46:49 23 guilt or innocence phase, but also in separate phases of
10:46:53 24 the trial whether there is eligibility for the death
10:46:55 25 penalty and if not, whether the death penalty or life in

10:47:01 1 prison is the appropriate punishment.

10:47:03 2 I suppose we would be in the same fix if the
10:47:07 3 motion that was not heard by the Court yet, having to do
10:47:12 4 with sanctions, the remaining one, was granted. So that
10:47:18 5 was still on the table as well, and the additional
10:47:22 6 aggravating factor was being requested by the defense to
10:47:25 7 be stricken as a sanction for some alleged discovery
10:47:30 8 violations, and I guess we would still be in the same fix
10:47:37 9 upon assembling the jury under those circumstances.

10:47:41 10 There are a variety of ways in which the
10:47:44 11 death penalty can be removed from the jury's
10:47:46 12 consideration, and when it is removed from the jury's
10:47:49 13 consideration, I think the Lockhart and progeny stand for
10:47:57 14 the proposition that it is not an unfair or a partial jury
10:48:03 15 that decides the case under those circumstances.

10:48:07 16 I am not saying that we don't quiz them
10:48:09 17 further about what ramifications there may be with regards
10:48:16 18 to their decision making process of the death penalty
10:48:19 19 being taken off the table, but I think each and every one
10:48:22 20 of the jurors understands what happens in a normal
10:48:27 21 criminal case. Punishment is not the concern of the jury
10:48:32 22 based on the multiple times that they have been informed
10:48:36 23 about that by the Court and by the questionnaire itself.

10:48:42 24 I think that they clearly and fully
10:48:46 25 understand that it's only if the death penalty is granted

10:48:50 1 or is sought in the first place, and then if the
10:48:53 2 aggravating circumstances are proven beyond a reasonable
10:48:56 3 doubt, that you get to a phase where the jury then decides
10:49:01 4 life or death.

10:49:02 5 And I don't -- I don't know that this jury
10:49:08 6 that we have presently will have seven or eight or nine
10:49:14 7 people that may have issues with regard to that, and what
10:49:21 8 do we do then. But I think that it's incumbent on the
10:49:24 9 Court to at least make some inquiry about that in the form
10:49:30 10 of additional voir dire.

10:49:32 11 I am not convinced, as Mr. Sears seems to
10:49:41 12 be, that having the jury that we have would automatically
10:49:47 13 be prejudiced against the defendant in some fashion. I
10:49:50 14 will grant that if the death penalty were not taken off
10:49:54 15 the table as late as it was, that we could have started
10:49:59 16 with the process and some people that were tossed from the
10:50:02 17 jury panel would not have been tossed if it was only on
10:50:08 18 the death penalty issues, either pro death penalty with
10:50:13 19 irrevocable views pro death penalty or anti-death penalty
10:50:18 20 with irrevocable views in that fashion. Some of those
10:50:22 21 people would still be on the panel had they been called.
10:50:27 22 There are a whole lot of propositions about who would have
10:50:30 23 been called or who would have been on the panel if it was
10:50:35 24 not a death penalty case from the start. We may not have
10:50:39 25 had the numbers of people that we have -- that we have

10:50:44 1 requested in the case.

10:50:46 2 So who would have been on the jury panel and
10:50:48 3 who wouldn't have been on the jury panel under those
10:50:50 4 circumstances, I don't know that you ever know that, but
10:50:55 5 we have a panel that we have invested a month of time in
10:51:01 6 and I don't think that the Court can engage in the same,
10:51:09 7 what I think is speculative, bootstrapping of the argument
10:51:12 8 that prejudice would occur from using the jury that we
10:51:17 9 have.

10:51:17 10 I don't -- I don't and haven't observed you
10:51:22 11 all conducting the examination, in combination with the
10:51:30 12 jury questionnaire, I don't see there's an issue of
10:51:32 13 ineffective assistance and it's interesting to see you
10:51:39 14 fall on your sword in that fashion, but I don't see it,
10:51:42 15 frankly. And I think that additional voir dire of the 40
10:51:47 16 that we have could address those kinds of issues and allow
10:51:51 17 you to make intelligent strikes if we have enough people
10:51:54 18 to make strikes from.

10:51:55 19 Right now we have I think 40 in a non-death
10:52:00 20 penalty case, noncapital case. Each side normally gets
10:52:04 21 six strikes. In a death case, you get ten strikes. We
10:52:10 22 have enough people to give you, each side, if we give you
10:52:14 23 equal strikes, eleven strikes I think, and still get to
10:52:18 24 the number of alternates that the Court was interested in
10:52:23 25 having given the numbers of weeks that the case intends to

10:52:30 1 take place.

10:52:31 2 The fact that jurors were removed or
10:52:35 3 potential jurors were removed for Morgan or Witherspoon
10:52:39 4 purposes in my mind doesn't mean that the jury deciding
10:52:42 5 the case cannot be fair and impartial.

10:52:44 6 A couple of clarifications for the record.
10:52:48 7 Mr. Sears says the jurors picked, and that is really not
10:52:52 8 true in the sense that we still have 40 persons. We are
10:52:56 9 looking for a jury of 18 with 12 to make the ultimate
10:53:02 10 decision. The jury hasn't been picked yet and I think
10:53:06 11 there's still opportunity for the Court and the lawyers to
10:53:11 12 see from the jurors that we have whether these jurors can
10:53:15 13 be fair and impartial.

10:53:16 14 Mr. Sears.

10:53:17 15 MR. SEARS: Your Honor, by way of clarification.
10:53:19 16 Are you committed to the proposition that even now we will
10:53:24 17 need a strike pool of 38 if we each have ten preemptories
10:53:28 18 and we are going to have 12 in the box plus six? Do we
10:53:31 19 have to stay at 38?

10:53:33 20 THE COURT: As distinguished from what? I am
10:53:37 21 open.

10:53:37 22 MR. SEARS: You start at the other end of the
10:53:39 23 spectrum and ordinarily in a noncapital homicide trial,
10:53:43 24 each side would have six preemptories.

10:53:46 25 THE COURT: Right.

10:53:46 1 MR. SEARS: But we have a problem and I have
10:53:48 2 thought about this. That if you have a pool of 38 or 39
10:53:52 3 and you say, well, we're going to go smaller. We are
10:53:54 4 going to go six preemptories down to the --

10:53:57 5 THE COURT: No. That's what I was saying. If we
10:54:02 6 are winding up with a jury of 18 and we have 40 to choose
10:54:07 7 from, I will give you an equal number of strikes that gets
10:54:10 8 us down to that number, which can address some of the
10:54:13 9 issues that you may have some concerns about with
10:54:16 10 particular jurors. That's giving you each five additional
10:54:20 11 strikes above and beyond what you normally would get for a
10:54:23 12 panel of --

10:54:25 13 MR. SEARS: I am trying to understand. If in the
10:54:26 14 voir dire process, we lose -- or just through attrition
10:54:30 15 between now and Wednesday, we lose some more jurors, where
10:54:32 16 do you think we are?

10:54:34 17 THE COURT: I will give you as many strikes as we
10:54:37 18 have extra people. I mean that's what I am saying. Your
10:54:43 19 proposition that, well, we could lose seven depending on
10:54:47 20 their answers to the questions. We could lose seven or
10:54:50 21 eight or nine. Even if we lose seven or eight or nine,
10:54:52 22 you still have enough people left to give each of you the
10:54:55 23 six strikes that you're entitled to.

10:54:57 24 MR. SEARS: Well, your Honor, if -- put this
10:55:01 25 another way. I think the absolute minimum number, if we

10:55:04 1 were committed to 12 plus six, plus another 12 is 30.
10:55:08 2 Right? So are you saying that we could go -- we could get
10:55:14 3 a strike pool that we would have to make strikes against
10:55:17 4 even if the number were as low as 30?

10:55:20 5 THE COURT: That's what I am suggesting.

10:55:22 6 MR. SEARS: I heard you say, I thought though,
10:55:25 7 that you thought in consideration of the issues with
10:55:29 8 respect to the death qualification, that you were inclined
10:55:32 9 to give Mr. Democker more than six strikes. To somehow
10:55:39 10 remediate the issues caused by the fact that we're now
10:55:43 11 striking against a death qualified jury.

10:55:45 12 THE COURT: Well, not -- I guess there are
10:55:49 13 different ways of viewing that. It's somewhat dependent
10:55:53 14 on how many we lose. I mean if we lose -- if we lose some
10:55:56 15 that say I was death qualified and I can't possibly decide
10:56:00 16 this case on the guilt or innocence phase now -- you know,
10:56:03 17 I don't think that is going to happen, but let's
10:56:07 18 hypothesize that it could happen where we get some hands
10:56:11 19 raised that simply I am so confused, I can't possibly give
10:56:17 20 the defendant a fair trial and I have thought about it and
10:56:20 21 I want to talk to you individually, we talk to them and
10:56:23 22 confirm that for reasons of confusion, we may need to let
10:56:28 23 some of them go.

10:56:30 24 If we are still down to 30, I think you can
10:56:37 25 still do the strikes you're entitled to on a preemptory

10:56:41 1 basis even if we lose that number.

10:56:44 2 What I am saying is I don't think that we
10:56:46 3 need to -- I don't think that this is a question of first
10:56:52 4 impression in Arizona or nationally. I don't think it's a
10:56:57 5 teeter -- I think the teeter totter image of cost and
10:57:04 6 difficulty and expense being against the defendant's sixth
10:57:10 7 amendment rights, I think that's a false analysis. I
10:57:12 8 think it's straw man that is easy to knock down, but I
10:57:15 9 think it's a false analogy.

10:57:17 10 I think that properly I ought to bring back
10:57:21 11 the jurors that we have and advise them that they will not
10:57:26 12 be involved in a capital case with a death penalty
10:57:32 13 allegation. There will not be two more phases of the
10:57:36 14 trial. That it is a standard criminal case, which as I
10:57:46 15 advised them already, the jury only determines whether the
10:57:51 16 accused is guilty or not guilty.

10:57:53 17 And as I advised them already, the
10:57:56 18 sentencing, the question of sentence at that time is
10:57:59 19 decided by the judge, not by the jury. I guess I don't
10:58:05 20 share the -- I don't share the underestimation of the
10:58:11 21 intelligence of the jury or the fairness of the jury.
10:58:14 22 Maybe that's -- that was -- maybe that was unfair in terms
10:58:18 23 of characterization, but I don't -- let me put it in a
10:58:24 24 positive way. I think people and particularly people that
10:58:28 25 we have talked to already are intelligent enough to be

10:58:31 1 able to follow the changes that have occurred in terms of
10:58:37 2 the penalty phase of the process and I think that at least
10:58:41 3 I ought to make some effort, because of the investment
10:58:45 4 that we have already made and the people that we have
10:58:48 5 already met and the answers that they have already given,
10:58:51 6 to make a determination about whether the defendant can
10:58:55 7 receive a fair and impartial jury out of that group with
10:58:59 8 some additional questioning instead of starting square
10:59:03 9 one.

10:59:04 10 MR. SEARS: Thank you, your Honor.

10:59:05 11 I think if the Court is inclined, we ought
10:59:07 12 to spend as much time as we need today to think about what
10:59:10 13 you're going to tell the jury about this and what this
10:59:13 14 voir dire is like.

10:59:14 15 THE COURT: I wasn't intending to even do that
10:59:16 16 today. I was intending to have you put something in
10:59:20 17 writing for me over the weekend and give me the whole
10:59:23 18 brief. Have three or four days to do that.

10:59:25 19 MR. SEARS: Am I right understanding, though,
10:59:27 20 that you think it's appropriate for both sides to have
10:59:29 21 additional voir dire with each of the panel members who
10:59:34 22 survives anything changed in your life hardship sort of
10:59:38 23 stuff? Because we certainly do.

10:59:40 24 THE COURT: That is something I still need to
10:59:44 25 think about. I am leaning -- I am certainly leaning

10:59:48 1 toward that with asking some general question about
10:59:54 2 indicating that the death penalty is off the table. That
10:59:57 3 there is -- would that make any changes in terms of your
11:00:05 4 ability to evaluate the case as a fair and impartial jury
11:00:09 5 and ask for a hands on that to take each of those
11:00:12 6 individually, but above and beyond that, I am not -- I am
11:00:18 7 not saying that I won't grant individual on everybody, but
11:00:23 8 I am inclined at least to grant individual voir dire on
11:00:26 9 people that would indicate either some confusion about the
11:00:29 10 question or some problem with serving on the jury above
11:00:35 11 and beyond the four or five questions that we normally
11:00:38 12 talk about, about what changes have been made in their
11:00:42 13 lives and what materials or information they may have
11:00:45 14 received, and about their general availability and those
11:00:50 15 sorts of questions.

11:00:52 16 MR. SEARS: And obviously one of the things that
11:00:54 17 we think every juror needs to be questioned about
11:00:57 18 individually is the fact that they know what the
11:01:02 19 punishment for first degree murder is and they know a
11:01:04 20 great deal about it. They know it's a judge decision.
11:01:07 21 They have information that no other juror would have if
11:01:11 22 this matter had been selected -- this jury had been
11:01:14 23 selected in a noncapital homicide case. They have that
11:01:17 24 information and they can't -- they can't be expected to
11:01:20 25 shake that. So I think at a minimum they need to be

11:01:22 1 talked to about that.

11:01:23 2 There is one other developing matter just to
11:01:25 3 make things even more complicated.

11:01:27 4 The State, when you asked for preliminary
11:01:30 5 jury instructions, the State submitted jury instructions
11:01:33 6 that we looked at and viewed as being final jury
11:01:35 7 instructions and not preliminary jury instructions, but
11:01:38 8 among them were instructions related to a lesser included
11:01:42 9 offense of second degree murder in this case.

11:01:45 10 Mr. Butner can speak to this directly, but
11:01:47 11 in my conversations with him, I believe that the State
11:01:51 12 intends to offer evidence in their case in chief of an
11:01:55 13 alternate second degree murder theory and in a defense
11:01:58 14 interview of Detective McDormett for the first time, we
11:02:02 15 heard some idea of law enforcement of an alternate second
11:02:07 16 degree theory.

11:02:09 17 The reason I raise this is this. That if
11:02:12 18 the jury -- if we tell the jury that they have no role in
11:02:14 19 sentencing, that changes if the State presents evidence
11:02:20 20 sufficient to justify a second degree murder charge
11:02:22 21 because under Blakely, the jury would have the
11:02:26 22 responsibility of determining the aggravator if the State
11:02:29 23 sought a sentence above the presumptive.

11:02:32 24 THE COURT: And that was true, frankly, of the
11:02:34 25 other charge, too, of burglary.

11:02:36 1 MR. SEARS: Burglary in this case too.

11:02:37 2 THE COURT: Burglary was charged already and has
11:02:40 3 a presumptive, aggravated and mitigated range.

11:02:42 4 MR. SEARS: So in being painstakingly honest with
11:02:45 5 these people, we have to give them the further confusing
11:02:47 6 idea that they don't have any role except what they do.

11:02:51 7 THE COURT: That's a fair question about what the
11:02:54 8 aggravating circumstances have been alleged vis-à-vis the
11:02:57 9 burglary already and the potential of a lesser included
11:03:00 10 offense.

11:03:00 11 Mr. Butner.

11:03:01 12 MR. BUTNER: Judge, we are not changing our
11:03:03 13 theory. That was submitted just as a lesser included type
11:03:07 14 of instruction.

11:03:08 15 THE COURT: Dependent on what the evidence that
11:03:09 16 is presented.

11:03:10 17 MR. BUTNER: Exactly. What the jury determines.
11:03:12 18 What they return as a verdict.

11:03:13 19 THE COURT: In terms of aggravating
11:03:16 20 circumstances, generally, I don't recall that there were
11:03:19 21 aggravating circumstances. I will grant that I wasn't the
11:03:21 22 first judge to receive the case, but I don't recall that
11:03:27 23 other than as applied in the death penalty context, that
11:03:30 24 there were aggravating circumstances otherwise sought.

11:03:33 25 MR. BUTNER: Judge, there weren't, but we're

11:03:35 1 going to request that we be allowed to argue that and
11:03:39 2 would file a motion on that basis.

11:03:41 3 THE COURT: You haven't filed anything any.

11:03:42 4 MR. BUTNER: I know that. We just dismissed the
11:03:44 5 death penalty and we have been dealing with that, and
11:03:48 6 that, of course, has changed the posture of the case in
11:03:50 7 that regards.

11:03:57 8 THE COURT: Well, at this point there aren't any
11:04:03 9 that the defendant has been put on notice of, and so the
11:04:07 10 jury wouldn't have a role. Obviously, I recognize that
11:04:10 11 under Blakely, the jury would have a role in making fact
11:04:14 12 finding determinations about the existence or nonexistence
11:04:17 13 of alleged aggravating circumstances, but I don't find
11:04:21 14 we're in a posture at this point where the jury would have
11:04:23 15 that role.

11:04:24 16 Mr. Sears.

11:04:25 17 MR. SEARS: I just tell you for the record that
11:04:27 18 it's quite likely that we'd vigorously oppose any request
11:04:30 19 by the State for such an instruction.

11:04:32 20 THE COURT: Is that right.

11:04:32 21 MR. SEARS: We haven't heard their argument, but
11:04:35 22 we would certainly oppose that. I think that goes without
11:04:38 23 saying, so that is why I am saying it.

11:04:40 24 THE COURT: All right. Let's take a 15 minute
11:04:45 25 break.

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(Recess.)

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THE COURT: Record reflects the presence of the

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defendant and his three counsel and the prosecution team.

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So that I'm clear on the record, the Court

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is denying at this time the defendant's motion for

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dismissal of the current jury panel.

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MR. SEARS: Your Honor, would it be appropriate

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to say that it's without prejudice pending further

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examination of the jury on Wednesday so that we don't have

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to file another motion.

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THE COURT: Based on what I said, it would be

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appropriate to say it's without prejudice.

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MR. SEARS: Thank you, your Honor.

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Before we turn from this subject, there are

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a couple of things that have occurred to us that we would

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like to take up, and one of them has to do with the

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question of which aggravators, if any, the State would be

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seeking to assert in a new trial of this case, however and

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whenever and wherever it provides, and I thought I heard

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Mr. Butner say they were going to file a notice.

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But it occurs to us that given this spectre

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of this second degree murder possibility, I think we're

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entitled to know before we speak to the jurors again what

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aggravators the State would offer on the burglary charge

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and on some as yet to be crystallized second degree murder

11:27:56 1 charge, because those are matters the jury heard. They
11:27:59 2 heard in great detail about the sole aggravator in this
11:28:02 3 case, pecuniary gain, which is coincidentally an
11:28:07 4 aggravator available for general felonies under 701, but I
11:28:10 5 think we need to know what the State is proposing.

11:28:15 6 THE COURT: Before you object to it.

11:28:17 7 MR. SEARS: Well, there is that, and then the
11:28:19 8 further question --

11:28:20 9 THE COURT: I don't disagree with you. You need
11:28:21 10 to know that and you need to know that ASAP.

11:28:24 11 MR. SEARS: And there is one issue that we agreed
11:28:27 12 to disagree about. It was connected to the stipulation
11:28:30 13 that was originally proposed to take death off the table,
11:28:33 14 but I think both sides would agree or at least the State
11:28:36 15 would say there is an unresolved question now about
11:28:39 16 whether cruel and depraved, which is again a 701
11:28:43 17 aggravator, could be re-urged by the State in this new
11:28:49 18 case on any basis. I am not just talking about jury
11:28:52 19 issues now. About whether they should be allowed to argue
11:28:55 20 that to you if there is a first degree murder conviction
11:28:58 21 and wanted a natural life sentence in this case by virtue
11:29:01 22 of your prior orders precluding it.

11:29:03 23 So I think we need to find a way and time to
11:29:05 24 address that issue if the State is going to seek to
11:29:10 25 re-urge that aggravator now.

11:29:12 1 I think that is a separate question.

11:29:15 2 THE COURT: Thank you.

11:29:17 3 No later than Tuesday I need to know in
11:29:22 4 written form and defense needs to know in written form.

11:29:25 5 MR. BUTNER: Certainly.

11:29:26 6 THE COURT: What, if any, aggravating
11:29:28 7 circumstances that you are going to file. Something along
11:29:29 8 those lines.

11:29:30 9 MR. BUTNER: Certainly, Judge. Thank you.

11:29:42 10 MR. SEARS: Your Honor.

11:29:42 11 THE COURT: Mr. Sears.

11:29:43 12 MR. SEARS: Again before we turn to this, I need
11:29:47 13 to tell you that we are seriously considering seeking
11:29:53 14 special action relief as we have indicated to the Court in
11:29:57 15 this matter.

11:29:58 16 THE COURT: Do what you must.

11:29:59 17 MR. SEARS: We have to -- due largely to the fact
11:30:03 18 we think this is a case of great magnitude and one of
11:30:08 19 first impression, and one that if were to be a ruling
11:30:12 20 statewide would have an effect statewide on capital cases
11:30:16 21 and on the way prosecutors approach the death penalty, but
11:30:21 22 for a couple of reasons we need expedited transcripts of
11:30:24 23 the individual voir dire in this case. We need them for
11:30:27 24 that and there is no reason to delay that.

11:30:31 25 We are not clear at this point whether it

11:30:34 1 would be appropriate to delay a special action until we
11:30:37 2 see whether or not we have a survivable panel after the
11:30:42 3 next go around with this group.

11:30:45 4 And that may be the case, but if we do, we
11:30:47 5 need that and if we didn't go that direction, we need it
11:30:50 6 to conduct the additional voir dire, and I can think of a
11:30:54 7 number of examples.

11:30:55 8 For example, just an example to us -- I said
11:30:58 9 a number of examples of jurors that we considered to have
11:31:03 10 problems with question 779 about the questionnaire whether
11:31:07 11 life without possibility of parole was a severe enough
11:31:09 12 punishment in this case, and over our objection a number
11:31:13 13 of jurors were qualified who indicated in varying ways
11:31:18 14 they had problems with that topic.

11:31:20 15 And we need to know what was asked and what
11:31:22 16 they said about those matters for purposes of follow-up
11:31:27 17 voir dire with them, because now those same jurors could
11:31:32 18 be expected -- first, they are going to be expected to
11:31:35 19 somehow wipe all of that discussion out of their mind, but
11:31:38 20 I am thinking of one juror that said -- and I think you
11:31:42 21 know who we're talking about -- said she was more likely
11:31:44 22 to vote for death to preclude the possibility of you
11:31:47 23 sentencing Mr. Democker to life with a possibility parole
11:31:51 24 after 25 years, and there are any number of other jurors
11:31:55 25 that we would have to identify.

11:31:56 1 But -- so I think there's no way that we
11:32:00 2 don't need this information, your Honor. Whether we need
11:32:03 3 to file a special action or not. We need to have it to
11:32:06 4 prepare and we need to have it for a special action. It
11:32:10 5 will have to be part of the record, because there is now
11:32:12 6 apparently a factual dispute that the State has positioned
11:32:16 7 about whether the voir dire was as oriented towards the
11:32:20 8 death penalty questions as we say it was and so the only
11:32:23 9 way that could be resolved would be through the record of
11:32:25 10 the actual voir dire itself.

11:32:29 11 So if you would consider that a request,
11:32:31 12 your Honor.

11:32:31 13 THE COURT: A request for what?

11:32:33 14 MR. SEARS: Expedited transcript of all the
11:32:35 15 individual voir dire and notifying all the court
11:32:37 16 reporters.

11:32:38 17 THE COURT: I will deny that request.

11:32:41 18 I had a pending motion in connection with
11:33:25 19 sanctions pointed toward, in particular, some Sorenson Lab
11:33:36 20 testing and I am not sure that we had ever concluded with
11:33:40 21 all -- any other sanction requests, so tell me, if you
11:33:51 22 would, what other sanction motions you feel have not been
11:33:54 23 adequately ruled on.

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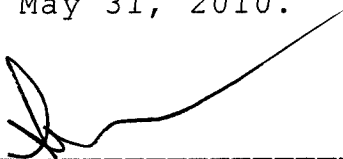
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2 C E R T I F I C A T E

3 I, SANDRA K MARKHAM, Certified Reporter, do
4 hereby certify that the foregoing pages constitute a true
5 and accurate transcript of the proceedings had and
6 testimony given in the hearing of the matter entitled as
7 upon the first page hereof.

8 Dated: May 31, 2010.

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10 _____
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